New INDIVIDUALIST Review

THE REVIVAL OF TRADITIONAL LIBERALISM
YALE BROZEN

CONSTITUTIONAL MYTHOLOGY
GORDON TULLOCK

ECONOMIC LIBERALISM IN POST-WAR GERMANY
WILLIAM S. STOKES

PROPERTY LAW AND RACIAL DISCRIMINATION
ROBERT M. SCHUCHMAN

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IN MEMORIAM

Robert M. Hurt

The editors and staff of *New Individualist Review* join with his family and his friends in mourning the tragic death of Robert M. Hurt. His contributions to this magazine covered the entire scope of its operations and reflected the wide range of his own abilities. The signed articles which he wrote demonstrated both his capacity for research and analysis, and his deep concern with the extension of freedom; his sense of humor was manifested in some of our advertisements; and more than any other person he is responsible for placing *New Individualist Review* on a firm financial base.

When he left the University of Chicago to join the faculty of Princeton University, we believed that he was launched on a career that promised high achievements; he had so much ability.

He was a friend to each of us, and a stimulating companion whose zest for his own special fields of the law and economics did not dampen his interest in matters as diverse as the philosophy of logical positivism and the domestic political situation in the new nations of Africa, and whose good temper and good humor kept animosity out of even the most heated discussion. He was a keen thinker, a thorough scholar and a dear friend; we will remember him with esteem, affection, and sorrow as we grieve for his untimely death.

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The Revival of Traditional Liberalism

YALE BROZEN

A druggist's assistant who, after listening to the description of pains which he mistakes for those of colic, but which are really caused by inflammation of the caecum, prescribes a sharp purgative and kills the patient, is found guilty of manslaughter. He is not allowed to excuse himself on the ground that he did not intend harm but hoped for good . . . .

We measure the responsibilities of legislators for mischiefs they may do, in a much more lenient fashion. In most cases, so far from thinking of them as deserving punishment for causing disasters by laws ignorantly enacted, we scarcely think of them as deserving reprobation. It is held that common experience should have taught the druggist's assistant, untrained as he is, not to interfere; but it is not held that common experience should have taught the legislator not to interfere till he has trained himself. Though multitudinous facts are before him in the recorded legislation of our own country and of other countries, which should impress on him the immense evils caused by wrong treatment, he is not condemned for disregarding these warnings against rash meddling . . . .

—Herbert Spencer[1]

A DISCUSSION OF the revival of liberalism should begin with a description of what it is—particularly since our latter-day reactionaries have stolen the name. They have stolen the label for a good reason: it stands for the opposite of what they propose. These reactionaries are attempting to disguise their desire to apply the interventionist policies of seventeenth-century mercantilism to twentieth-century society.

Literally, liberalism meant to liberalize or liberate—to make free—to permit men to do or say whatever they wished. Of course, there was a constraint implied in this. No man could do anything which affected the liberty of others. To permit some men to intervene in the lives of others would be the opposite of making men free. This would make some men unfree—subject some men to tyranny by others. The classical liberal was and is opposed to all forms of tyranny.

This constraint on the individual, to preclude what has been called license, implies equality in the right to be free. Opposition to all tyranny is equalitarian. Unfortunately, some economists imbued

Yale Brozen is Professor of Business Economics at the University of Chicago and an Editorial Advisor to *New Individualist Review*. He has contributed numerous articles to professional journals.

[1] Herbert Spencer, *The Man Versus the State* (New York: Appleton, 1897), pp. 338-39.

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with the equalitarianism in liberty implied by opposition to tyranny came to confuse liberalism with another position —equalitarianism in the distribution of income. They began to scrutinize every public policy for its effects on the distribution of income.

"A growing number of economists, indeed, implicitly argue that no other injustice equals in enormity that of large differences in income."[2] From this position began the rationalization of intervention to make those lower on the income scale better off by methods other than removing the barriers to self-improvement or to charitable actions by private persons. At first it was argued that the state should be used to transfer income from those higher on the income scale. From this it was an easy step to forcing people low on the income scale (and others) to do what the interventionist felt would be good for them, even though these people did not wish to do these things. The new tyranny was born —or rather the old tyranny was re-born.

Historically, the rise of liberalism was in opposition to tyranny from two sources. One source was the tyranny of private persons or associations such as monopolies and guilds (usually through a grant of power from the sovereign). Monopolies and guilds could and did prevent men from consuming things which otherwise would have been available. They could and did prevent men from seeking and obtaining jobs otherwise available to them. While tyranny in this form may seem to be a small thing, it was odious not only because some men had the power to dictate economic conditions to others, but also because such dictation could be used to bend men to accept the political dictates of those possessing the power.

The second source of tyranny was the state—those who manned the political apparatus. The possessors of political power could grant or withhold favors and could thus bend men to their will. Not only could they withold favors, but they also could take punitive action, even going so far as to take the lives of those who would not obey them. As one writer has said, "Government is in the last resort the employment of armed men, of policemen, gendarmes, soldiers, prison guards, and hangmen. The essential feature of government is the enforcement of its decrees by beating, killing and imprisonment."[3] The spectacle of some men forcing others to crawl, or possessing such power, was shocking to those bred in traditions of liberty.

NEVERTHELESS, DESPITE a long tradition in the United States of constant battle to reduce the amount of power by some private agents — such as businesses — we have permitted much coercion by other private agents, notably trade unions; at the same time we have allowed enlarged powers to be assumed by the state, opening up new possibilities for unwanted coercion. Trade unions in the city of Chicago, for example, prevent anyone from becoming a plumber or a plastering contractor unless his father or his uncle was a member of the plumbers' union or the Plasterers' Institute. Political dissenters find building inspectors invading their homes and hauling them into court for presumed violations of the building code. Those in the restaurant and grocery business who disagree with the men in power find their establishments do not measure up to the standards of health inspectors. Property assessments have a suspiciously uniform tendency to rise for those property owners who do not go along, while they tend to decrease for those who "play ball." The Federal administration's Bureau of Internal Revenue has harassed newspapermen and steel executives who do not agree with the Administration's views.

The power of the government has grown as it has, in part, because native Americans have had little experience with tyrannical governments. There has been a naive trust in the good will, the

[2] G. J. Stigler, *Five Lectures on Economic Problems* (London: Longmans, 1948), p. 1.

[3] L. von Mises, *Human Action* (New Haven: Yale University Press, 1949), p. 715.

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beneficence, and even the omnipotence of government. Many Americans have felt that whenever the government does something, it must be in their interest and that their government will not take advantage of them.[4] The modern "liberal," the reactionary in disguise, suspects every businessman of an intent to bilk him. On the other hand, he trusts every bureaucrat and trade union officer to look out for his interest. I, on the contrary, suspect everybody of looking out for his own interests, be he businessman, bureaucrat, union officer, consumer, Congressman, workman, or the ordinary citizen. I am somewhat willing to trust a businessman to serve me well since any attempt to bilk his customers will mean that he will lose business to competitors. This, at least, means that it is to his self-interest to serve me well.

The average politician I trust a great deal less since he is quite willing to serve my interest badly if the support he gains at my expense is crucial to his election. Besides, he can confuse the issue by offering a few items in his platform which have some appeal to offset the other things which are distasteful. In every election, I have had to choose either the grab bag of proposals offered by one party, 95 per cent of which are distasteful, or the grab bag offered by the other party, 97 per cent of which are distasteful. That is hardly a choice. At least, when I buy a General Motors automobile, I do not have to buy GM gasoline, GM schools for my children, GM garbage collection service, GM old age annuities, or GM anything else. In a free market, I can separate my decisions on what automobile I buy from my choice of what gasoline I consume, which service station I patronize, which mechanic I go to for repairs, or which company insures my car or administers the funds I save for my retirement income.

In a political market, choosing the party which offers the best school program means I may also have to take a poor street repair program, inferior garbage collection services, and indifferent operation of the water works. For that reason, I prefer that the government do less rather than more. I can make more of each of my decisions separately from other decisions. Thomas Jefferson expressed this very pointedly when he said, "That government is best which governs least."

I think another reason that Americans have allowed their government to take on an uncontrollably large number of functions is because we have improved so many things and solved so many problems (by private action, in most instances) that we think all problems can be solved—and we are an impatient people who believe it is better to take care of our problems today instead of next year.

As one of my colleagues has put the matter:

> Our faith in the power of the state is a matter of desire rather than demonstration. When the state undertakes to achieve a goal, and fails, we cannot bring ourselves to abandon the goal, nor do we seek alternative means of achieving it, for who is more powerful than a sovereign state? We demand, then, increased efforts of the state, tacitly assuming that where there is a will, there is a governmental way.
>
> Yet we know very well that the sovereign state is not omnipotent. The inability of the state to perform certain economic tasks could be documented from some notorious failures. Our cotton program, for example, was intended to enrich poor cotton farmers, increase the efficiency of production, foster foreign markets, and stabilize domestic consumption. It is an open question whether twenty-eight years of our farm program have done as much for poor cotton farmers as the trucking industry and mail-order houses.[5]

[4] A letter received by the author is typical: "The only theoretical treatments of the minimum wage laws I have seen suggest that they are unfavorable to the economy as a whole. But somehow I find it hard to believe that the law could be passed and extended and the level raised several times if it is supported by nothing more than wishful thinking." October 26, 1964.

[5] G. J. Stigler, "The Government of the Economy," G. J. Stigler and P. A. Samuelson, *A Dialogue on the Proper Economic Role of the State* (Chicago: University of Chicago Graduate School of Business, Selected Papers no. 7, 1963), pp. 3-4.

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Now that we have lived so long with government intervention in our economy, a few professional economists have begun to examine the results of that intervention. Some findings from these examinations are beginning to appear and affect, at least, the attitudes of an increasing number of scholars. If any resurgence of liberalism is occurring, this is the primary place where it is apparent to me. However, I am extremely poorly informed on the attitudes of undertakers, bricklayers, Republicans and Democrats.

Four years ago, an opinion study showed that 73 per cent of the college economists of this country were definitely in favor of additional government intervention in the economy. Sixteen per cent were opposed. The rest expressed no leaning either way.[6] An opinion study done last year showed that the group opposed to additional government intervention had grown to 35 per cent and the group still in favor of more intervention had shrunk to about 50 per cent.[7]

WHAT ARE THE studies leading to this change in attitude? First, I should mention a group of studies examining the effects of regulation of the transportation industries by the Interstate Commerce Commission, Civil Aeronautics Board, and the Federal Maritime Commission. One study done a few years ago points to several features of transportation regulation which produce undesirable results.[8] Let me cite one instance of the way in which railroad-trucking regulation has worked. The railroads petitioned the ICC for permission to reduce freight rates on cigarettes in the early 1950's. They had lost most of the cigarette transportation business to trucks since the rail rate on cigarettes was higher than the truck rate. The railroads examined their cost of transporting cigarettes and found they could make money at much lower rates than they had been charging. After extended hearings, during which the reduction was not allowed to go into effect, the ICC finally decided that the railroads had an inherent advantage over trucks in moving cigarettes and, therefore, should have the business. In their wisdom, the ICC commissioners decided to divert business to the railroads, not by acceding to the railroad request for permission to reduce rates, but by raising truck rates.[9]

If this were an isolated and exceptional act of the Commission, it would produce little reaction. However, a recent study of the behavior of the Commission in its founding days, 1888-1890, indicates that raising rates is an old Commission tradition.[10] Before the ICC was formed by the Interstate Commerce Act of 1887, railroads between Chicago and New York entered into agreements with each other to maintain prices at specified levels on Chicago-New York shipments of corn and grain. These agreements were seldom successful. Railroads secretly sold transportation services at less than the agreed-upon price, and frequently at much less. In practice, the cartel of railroads rarely found it possible to maintain the agreed-upon price.

After 1887, the ICC was empowered to prevent the setting of long distance rates below the level of short haul rates. Since cutting the long haul rate between Chicago and New York made it necessary to also cut short haul rates, the net result was that railroads stopped competing for long haul business by cutting rates. After 1888, Chicago-New York rates were not kept low by competition between railroads. Rates tended to stay at

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[6] National Opinion Research Center, *A Personal Interview Survey of College Economics Teachers* (mimeographed).

[7] Chase Manhattan Bank, "321 Economists Comment on Key Public Issues," *Business in Brief*, Nov.-Dec., 1963.

[8] J. R. Meyer, M. J. Peck, J. Stenason and C. Zwick, *The Economics of Competition in the Transportation Industries* (Cambridge: Harvard University Press, 1959).

[9] James C. Nelson, *Railroad Transportation and Public Policy* (Washington: The Brookings Institution, 1959).

[10] P. W. MacAvoy, *Trunk Line Railroad Cartels and the Interstate Commerce Commission 1870-1900: A Case Study of the Effects of Regulation on Price* (multilithed).

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the levels railroads had attempted to set by agreement before they had the ICC to run their cartel for them.

We also suffered the usual consequences of cartel operation. High prices induced over-investment in the railroad industry, draining capital from other uses where we needed tools and equipment, creating over-capacity (from which the railroads are still suffering) and causing under-utilization of the available plant because the business available was restricted by high prices. Incidentally, the ICC is now asking for additional legislation from Congress to strengthen its power to operate as a cartel authority.

Still another study in the transportation industry, this time the effect of regulation of the price of transportation of processed foods, has produced shocking findings. This category of transportation was formerly exempt from regulation under the general exemption of agricultural commodities. The exemption was narrowed by the 1958 Transportation Act to exclude processed agricultural commodities. After this phase of transportation came under regulation by the ICC, transportation charges promptly jumped by 20 per cent.[11]

IT IS NOT ONLY the ICC which behaves this way in the transportation industry. The CAB withdrew certification from North American Airlines and drove them out of business after they pioneered air coach transportation. North American carried passengers for 30 per cent lower fares than other airlines, despite the subsidies received by these other airlines, with never an accident during the time they carried 6,000,000 passengers.[12] An intra-state airline (which is exempt from CAB regulation because it flies intra-state) flying today in California from Los Angeles to San Francisco, carries passengers at lower fares than those which prevail on any regulated airline segment of comparable length and traffic density (and makes just as much money on its investment).[13]

The Federal Maritime Board forces all subsidized ship lines to join the ocean conferences which cartelize ocean transportation. Conference-set rates are higher than those charged by ship owners and operators who are not members of the conference. Not only does the Board force higher rates on American shippers, but also follows policies in its construction and operating subsidy program which result in the inefficient design and operation of American ships. American ships carry bigger crews and are more expensive to operate than foreign ships. Since American seamen's wage rates are higher than those of foreign seamen, you would expect labor-saving features to be built into American ships that would not be found on foreign ships. Instead, the reverse is true. Because the operating subsidy provided by the federal government is based on the excess of the American crew costs over foreign crew costs, no subsidized ship operator finds it to any advantage to pay the extra cost of labor-saving equipment.[14]

So much for some of the material developed in a few of the recent studies of the transportation industry. These data are not the sort to make economists feel that the heavy hand of government is beneficent or produces results preferable to those that will occur in a free market.

RECENT STUDIES of public utility regulation do not make this bit of intervention any more appealing, although this is the one area that more economists have agreed upon as being a proper sphere for government intervention than any other. A study of the Federal Power

[11] Reported by Dr. George Hilton at the Conference on Regulated Utilities, June 15, 1963, at the Center for Continuing Education, University of Chicago.

[12] For a concise discussion of the CAB see S. Peltzman, "CAB: Freedom from Competition," *New Individualist Review*, Spring 1963, pp. 16-23.

[13] M. R. Colberg, D. R. Forbush, and G. R. Whitaker, *Business Economics* (Homewood, Ill.: Irwin, 1964), pp. 130-31.

[14] A. R. Ferguson, E. M. Lerner, J. S. McGee, W. O. Oi, L. A. Rapping, and S. P. Sabotka, *The Economic Value of the United States Merchant Marine* (Evanston: Northwestern University Press, 1961).

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Commission regulation of the natural gas industry has shown that regulated field prices of natural gas sold to interstate pipe line companies are about seven per cent higher than they would be in the absence of regulation of field prices.[15]

A study of the regulation of prices for electric energy reaches the conclusion "that it is very doubtful whether consumers have been saved as much by public regulation of the electrical utilities as they have had to pay, directly and indirectly, for regulation."[16] Another study shows the prices for electricity and gas are *higher* in those states where commissions severely restrict the rate of return on investment (to less than 6½ per cent) than in those which do not. In those jurisdictions where electric companies are allowed to earn more than 6½ per cent return, the average price for 500 KWH to a residential consumer was $9.82. In those jurisdictions where the rate of return was restricted to less than 6½ per cent, the average cost to a residential consumer for 500 KWH per month was $10.14.

A study of gas utilities reached a similar finding. The companies allowed to earn more than 6½ per cent charged $8.62 for 100 therms of residential gas service. Those restricted to less than 6½ per cent charged $10.58 (about 20 per cent more).

Here is a paradox that non-economists find hard to believe, much less understand. How can a company make more by charging less? The answer lies in the fact that those companies allowed to earn more than 6½ per cent can attract the capital which can be used to install cost-saving equipment; allowing them to earn more thus benefits the consumer. Profits in the American economy are, by and large, not made at the expense of the consumer. They are made by doing a better job in production or design of product — by benefitting consumers.

[15] R. W. Gerwig, "Natural Gas Production: A Study of the Costs of Regulation," *Journal of Law and Economics*, V (1962), 69-92.

[16] G. J. Stigler, "The Government of the Economy," in Stigler and Samuelson, *op. cit.*, p. 6. See also: G. J. Stigler and C. Friedland, "What Can Regulators Regulate? The Case of Electricity." *The Journal of Law and Economics*, V (Oct. 1962), 1-16.

Some sacred cows of those economists who believed most profits are made by monopolizing were slaughtered by this study. Even more, it casts grave doubts on the usefulness of government intervention in the one area which most economists have agreed required regulation to prevent monopolistic exploitation of consumers.

CONCERNING AGRICULTURE, farmers themselves seem to be reaching the conclusion that they are worse off *with* government intervention than without it—or at least wheat farmers seem to have reached this conclusion, judging by the latest wheat referendum. Farmers have found they received higher prices for wheat with government intervention, but they also endure higher costs as a consequence of acreage restrictions on their operations. The Agricultural Program conveys little benefit to most farmers at great expense to every taxpayer. Since farmers have begun to discover this, economists, too, are gradually becoming aware of it.

Some recent studies by agricultural economists have demonstrated that many of the programs supposedly designed to benefit the farmers have been hurting them. It seems obvious that subsidizing the use of fertilizer and machinery would help farmers by reducing their costs of production. What has seemed to be so obviously true turns out to be completely false. The increased output with subsidies has driven prices down with the result that farmers are not any better off. Those who are tenants and obtain their return from their labor are worse off because labor values are decreased by the substitution of fertilizer and equipment.[17] Those who are owner-operators are worse off not only because the return earned by their labor is reduced, but also because that earned by their land is decreased. Fertilizer and equipment are substitutes for land and sub-

[17] D. G. Johnson, "Labor Mobility and Agricultural Adjustment," in E. O. Heady, H. G. Diesslin, H. R. Jensen, and G. L. Johnson ed., *Agricultural Adjustment Problems* (Ames, Iowa: Iowa State College Press, 1958), pp. 163-72.

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sidizing their use reduces the return to land compared to what it otherwise would be.[18]

The farm programs of the federal government have not only failed to benefit the farmer, but they have also been mutually off-setting with their only net result being a higher tax burden and a waste of resources. The spectacle of multi-billion dollar reclamation programs putting more land under cultivation occurring side-by-side with a soil bank program taking land out of cultivation does not appear to be a more rational management of the economy than that resulting from the operation of free markets. Yet, the main argument of interventionists has been that the government can plan rationally. They have argued that the free market is at best non-rational but usually irrational. In the face of this evidence, it appears that government planning is far more irrational than even the severest critics of free markets could ever impute to the operation of the market.

ANOTHER GREAT disillusionment being suffered by the interventionists is the result of the examination of the programs presumably designed to benefit the poor and the disadvantaged. Urban renewal programs were launched with a great fanfare of propaganda concerning what they would do to improve the housing of the poor. The net result of our urban renewal programs has been increased cost of housing for the poor and the destruction of the livelihoods of hundreds of small businessmen. A typical urban renewal project is one in Chicago which had these results: 4,632 dwellings used by the lowest income groups in Chicago were destroyed. These were replaced by 2,040 apartments now used by middle income families.

In effect, 4,600 low income families were forced out of their homes and told to go find other housing. With the reduced supply of low-rent units, they typically had to pay higher rents in bidding for the remaining supply. A Chicago Housing Authority study of relocation in 1952-1954 showed that the average rent paid by the dispossessed before destruction of their homes was $37 per month. The average rent this group paid after being dispossessed went to $67 per month.[19] It hardly helps the poor to take their homes away and force them to rent more costly residences.

ANOTHER MEASURE which interventionists thought would help the poor was the passage of minimum wage legislation. They believed Sidney and Beatrice Webb, who argued that "higgling in the market" would reduce all wages to bare subsistence (or below). They believed that employers have the power to exploit their employees. All that had to be done to improve the lot of the poor was to pass a law which would stop the exploitation of labor by employers.

As it turned out, it has become evident that employers were paying people what they were worth. As the minimum wage rate has been raised, more and more people have been laid off who were not worth the higher wage rate[20] or have failed to find jobs which would otherwise have been available.[21] They were not being exploited. They were receiving low wage rates because they were not worth any more. The people laid off have been forced to take jobs not covered by the minimum wage law where they received even lower

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[18] D. G. Johnson, "Output and Income Effects of Reducing the Farm Labor Force," *Journal of Farm Economics* XLII (Nov. 1960), 779-96.

[19] Cited by Professor Joel Segall in a paper presented at Rockford College, December 2, 1962, from Chicago Housing Authority sources. A published study by The Chicago Housing Authority (*Rehousing Residents Displaced from Public Housing Clearance Sites in Chicago, 1957-58*) showed that the median rent paid by 161 families occupying housing destroyed by the Authority in 1957 was $51/month in the destroyed housing. After relocation, these families paid a median rent of $77 — an increase of 51 per cent.

[20] J. M. Peterson, "Employment Effects of Minimum Wages, 1938-50," *Journal of Political Economy*, LXV (Oct. 1957), 412-30.

[21] D. E. Kaun, *Economics of the Minimum Wage: The Effects of the Fair Labor Standards Act*, (Ph.D. Dissertation, Stanford University, 1964).

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wage rates than in the jobs they lost[22] or they have remained unemployed. Unemployment among teenagers, for example, has gone from 595,000 in 1949, when the minimum wage rate was $0.40 per hour (and large unemployment might have been expected because this was a depression year), to 979,000 in 1963, a prosperous year, a year in which the minimum wage rate was raised to $1.25 per hour. To the extent that teenagers are inexperienced, unskilled workers, they are the ones who have been priced out of the market by the rise in the minimum wage. Even my interventionist friends are beginning to believe that all teenagers should be exempted from the application of minimum wage laws. Perhaps they will soon learn that we should simply repeal all minimum wage laws.

One more point should, I think, be made in connection with teen-age unemployment. A leading interventionist, Willard Wirtz, Secretary of Labor, believes that the solution to this problem lies in extending compulsory education by another two years. It is typical of the interventionists that they suggest simple answers based on the treatment of all people as if they were identical, homogeneous units. It is typical that they will force people to do what they regard as being good for these people, whether or not those whose freedom is being infringed regard this as desirable. As a matter of fact, the proportion of fourteen to seventeen-year olds in school has increased from 83.3 per cent fifteen years ago to 90.3 per cent today.[23] This is in response to the fact that wage incomes of those with more years of schooling have gone up more than the wage incomes of those less educated.

Of those who are not in school, I would venture the guess that most of them were not finding the schooling available to them useful or rewarding. Forcing them to remain in school would be more likely to reduce the efficiency of the educational process than to improve the skills and make employable these unwilling drinkers at the fountain of knowledge.

FINALLY, LET ME turn to the most telling charge which has been made against free markets. The primary weapon of the socialists in their attack on free enterprise is the business cycle and the suffering caused by cyclical unemployment. If classical liberalism and the *laissez faire* for which it stands is vulnerable to attack, cyclical unemployment is the Achilles heel.

On this score, recent studies of the causes of the business cycle have disclosed that the primary cause is a change in the rate of growth of the stock of money.[24] A turn in the rate of increase in the stock of money is followed by a turn in business and employment. A downturn in the rate of increase in the stock of money is followed by a downturn in employment about six months later, on the average.

Let me describe a few instances: Sharp rises in Federal Reserve rediscount rates and imposition of penalty rates on borrowers occurred in late 1919 and in the first half of 1920. This caused a decline in the stock of money. The reduction in the stock of money was followed by an increase in unemployment from 1.5 million in 1920 to over 5 million persons in 1921.[25]

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[22] Y. Brozen, "Minimum Wage Rates and Household Workers," *Journal of Law and Economics*, V (Oct. 1962), 103-9.

[23] U. S. Bureau of the Census, *Statistical Abstract of the United States: 1964* (Washington: U. S. Government Printing Office, 1964), p. 109. For information on the relation of education to income, see *Ibid.*, p. 115.

[24] M. Friedman, "The Demand for Money: Some Theoretical and Empirical Results," *Journal of Political Economy*, LXVII (Aug. 1959), 327-351; M. Friedman and D. Meiselman, "The Relative Stability of Monetary Velocity and the Investment Multiplier in the United States, 1897-1959," in Commission on Money and Credit, *Stabilization Policies* (Englewood Cliffs, N. J.: Prentice-Hall, 1963), pp. 165-268. M. Friedman, "The Monetary Studies of the National Bureau," *The National Bureau Enters Its Forty-Fifth Year* (New York: National Bureau of Economic Research, 1964), pp. 7-25. Annual Report. M. Friedman and A. J. Schwartz, *A Monetary History of the United States* (Princeton: Princeton University Press, 1963).

[25] R. F. Wallace, "The Use of the Progressive Discount Rate by the Federal Reserve System," *Journal of Political Economy*, LXIV (Feb. 1956), 59-68.

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The contraction of Federal Reserve credit in late 1928 and early 1929 caused a decrease in the stock of money which started unemployment rising.[26] It jumped from 1.6 million in 1929 to over 5 million in 1930. The decline in money stock was intensified after September 1931 by deflationary actions on the part of the Federal Reserve when it panicked over the loss of gold. The result was a horrifying rise in unemployment to over 12 million persons in 1932.

The increases in required reserve ratio by the Federal Reserve Board in August 1936, and again in March 1937, and once again in May 1937, turned the stock of money down and sent unemployment soaring.[27] From approximately 6 million in mid-1937, unemployment rose to over 11 million in 1938.

Turning to the post-war period, fluctuations in unemployment were considerably milder. Nevertheless, we find the same relationship holding between governmental manipulation of the stock of money and unemployment. The rise in the required reserve ratio in February, June and September of 1948, along with other Federal Reserve actions in the government bond market, began a decrease in the stock of money which sent unemployment in 1949 to almost 4 million from the 2 million level of 1948.[28]

Again, in 1952, the Federal Reserve Board reduced the rate of increase in the stock of money.[29] At mid-1953, unemployment started to climb, doubling to about 3.5 million in 1954.

Still again, the Federal Reserve Board reduced the rate of increase in the money supply in 1956.[30] Recession began in mid-1957 and the unemployment level rose to over 5 million in 1958.

In 1959, the Board began limiting the reserves available to banks and started a downturn in the stock of money.[31] Recession began in early 1960 with unemployment again rising to over 5 million in 1961.

I have gone into some detail to show that the primary cause of cyclical unemployment does not lie in the unregulated behavior of free men in free markets. Those who have argued for greater governmental intervention on the grounds that a free enterprise system is unstable have chosen the wrong target for their criticism and the wrong means to cure the problem which worries them. The source of instability has been the government. The cure for instability is less government — not more. We would have less instability if the Federal Reserve Board stopped toying with the supply of money.

The study of the causes of cyclical unemployment has had a great unsettling effect on those economists who have thought we needed more government activity in the economy.[32] Most have not yet accepted the conclusions of the study. They are resisting the recognition that they have been wrong and they have attempted to refute the study. The attempts to date have failed; the data are too overwhelming. Opinion in the profession is starting to swing, even though old ideas do not die easily, especially since repetition seems to be regarded as a more cogent proof of a proposition than any evidence a scholar can offer.[33]

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[26] L. Currie, "The Failure of Monetary Policy to Prevent the Depression of 1929-32," *Journal of Political Economy*, XLII (April 1934), 145-77.

[27] M. Friedman and A. J .Schwartz, *A Monetary History of the United States, 1867-1960* (Princeton: Princeton University Press, 1963), pp. 543-45.

[28] *Ibid.*, pp. 604-610.

[29] "Bank Reserves, Bank Credit and the Money Supply: 1951-1963," *Federal Reserve Bank of St. Louis Review*, XLV (Oct. 1963).

[30] *Ibid.*, pp. 4-5.

[31] *Federal Reserve Bank of of St. Louis Review, Loc. Cit.*

[32] George J. Staller, "Fluctuations in Economic Activity: Planned and Free Market Economies, 1950-1960," *American Economic Review*, LIV (June 1964), 385-95, shows that the eight planned economies of the European Communist Bloc were more unstable than the free market countries composing the Organization for Economic Cooperation and Development in the period of the fifies.

[33] For example, J. A. Schumpeter, *History of Economic Analysis* (New York: Oxford University Press, 1954), has referred to the reluctance of economists to recognize that bank loans create deposits. He remarks, "This is a most interesting illustration of the inhibitions with which analytical advance has to contend and in particular of the fact that people may be perfectly familiar with a phenomenon for ages and even discuss it frequently without realizing its true significance and without admitting it into their general scheme of thought."

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I WOULD LIKE to close by quoting an observation of a nineteenth-century German immigrant to America:

> Here in America you can see how slightly a people needs to be governed. . . . Here are governments, but no rulers — governors, but they are clerks. All the great educational establishments, the churches, the great means of transportation, etc., that are being organized here—almost all of these things owe their existence not to official authority, but to the spontaneous cooperation of private individuals. It is only here that you realize how superfluous governments are in many affairs in which, in Europe, they are considered entirely indispensable, and how the opportunity of doing something inspires a desire to do it.[34]

[34] Carl Schurz, in one of his writings.

The most telling and effective recent evidence casting doubt on the beneficence of government and the presumed inability of free markets to serve the common good, and such social goals as improving the lot of the average man, is provided by the "miracle" of West Germany[35] and Japan, and the failure of the socialized governments in the Iron Curtain countries. We might put this in the words of a recent cartoon showing two Russian officials chatting with each other. One is saying, "When all the world is Communist, where will we get wheat?"

[35] See E. Sohmen, "Competition and Growth: The Lesson of West Germany," *American Economic Review*, XLIX (Dec. 1959), 936-1003. J. Hennessy, V. Lutz, and G. Scimone, *Economic "Miracles"* (London: Andre Deutsch, 1964).

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Constitutional Mythology

GORDON TULLOCK

MYTHS, AS A PART of literature, can be entertaining and even illuminating, but if they are believed and acted upon they can be dangerous. There is such a dangerous myth which is widely believed at the present time by Americans. This myth, that "the Constitution is what the Supreme Court says it is," has the logical corollary that no action taken by the Supreme Court can be unconstitutional, and hence that decisions by the court are binding upon the executive and legislative branches. If the myth were true, then it would mean that the system of checks and balances set up in our constitution is incomplete. The powers of the legislative and executive branches are subject to checks, but those of the judicial branch are uncontrolled. Given the care which the drafters of that historic document obviously took to give no person or organization absolute power, this would be most surprising. The founders of our nation did not feel that the form of government they established could safely be trusted to the good will or self-restraint of any individual or body of men. Instead they built into the structure of government a system in which possible abuse of power by any branch could be checked by the others. If the popular myth of supreme court supremacy were true, then we would have to conclude that the founding fathers distrusted the elected legislature and the elected president, but somehow felt no suspicion of the appointed supreme court. Surely this is absurd.

The power of the Supreme Court to declare acts of Congress unconstitutional was first established in the famous case of *Marbury v. Madison* by Chief Justice John Marshall. It is interesting that this case concerned a "plain violation" of the rights of five individuals. The Court refused to take action to redress the wrong to these individuals because it held that the act which gave them the right to sue before its bar was unconstitutional. In other words, it put enforcement of the Constitution above human rights. The reasoning upon which it did so is still the foundation of the doctrine of unconstitutionality.

Marshall's argument, adhered to by all commentators from his day to the present, may be summed up by one paragraph from his decision:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.[1]

Clearly this paragraph would make as much sense if the words "executive" or "judiciary" were substituted for "legislature." The view that the executive or

Gordon Tullock is Associate Professor of Economics at the University of Virginia. His latest book is *The Politics of Bureaucracy;* he is coauthor of *The Calculus of Consent.*

[1] Marbury v. Madison, 5 U. S. (1 Cranch) 137, 177 (1803).

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the judiciary is not bound by the Constitution would as much subvert the document as the view that the legislature is not so bound. It is true, of course, that we must not expect to find the court announcing that its own acts are unconstitutional, any more than we should expect to find the legislature passing laws which it explicitly states are unconstitutional. In each case the constitutional check is imposed from the outside, not by a given branch of the government judging its own acts.

The same principle will be found to fit the remainder of *Marbury v. Madison.* Marshall was a judicial officer engaged in deciding whether he would obey a law duly passed by the legislature and signed by the President. As such he confined his language to this particular problem and did not discuss the complementary problems which would arise if the court made an unconstitutional determination. Nevertheless, his language is still convincing if it is applied to the converse problem. As an illustration let us make the necessary changes for two and a half paragraphs:

> If, then, the [executive] is to regard the constitution, and the constitution is superior to any [judicial decision], the constitution and not such [decision], must govern the case to which they both apply.
>
> Those, then, who controvert the principle that the constitution is to be considered, [by the executive], as a paramount law, are reduced to the necessity of maintaining that the [President] must close [his] eyes on the constitution and see only the [decision].
>
> This doctrine would subvert the very foundation of all written constitutions. It would declare that . . . [a decision] which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. . . .[2]

THE CONTRARY VIEW, that decisions of the Supreme Court are superior to the Constitution because "the Constitution is what the Supreme Court says it is" has never been claimed by the Court, although a Chief Justice once said this in a speech. The Court in its decisions always claims that it is bound by the Constitution. It does not purport to have the power to change the Constitution, only to interpret and to apply it. It is, of course, true that the Constitution is a rather short document and almost 175 years old for the most part. Interpretation under these circumstances may frequently involve interstitial law making; in fact this is the main function of the Supreme Court. There is, however, a great difference between deciding what the Constitution should mean in an area where it is unclear, and deliberately going against the plain words of the document. A decision, for example, that the Senate must be elected according to population would clearly and obviously be unconstitutional.

Marshall, however, had one more problem after he had demonstrated that the Constitution was superior to the acts of a branch of the government; he had to show that the Court was charged with a duty of enforcing the Constitution. His method was simple: he pointed out that the Constitution "direct[s] the judges to take an oath to support it."

> This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support![3]

Continuing this line of reasoning, the final full paragraph of his decision reads:

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.[4]

The argument, again, makes as much sense if the name of another department is substituted for that of the judiciary, as Marshall explicitly recognizes in the

[2] 5 U. S. (1 Cranch) at 178.

[3] 5 U. S. (1 Cranch) at 180.

[4] 5 U. S. (1 Cranch) at 180. (Italics in original.)

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last full line of the above quotation. The same sentence of the Constitution which requires judges to support the Constitution also requires legislators, and other officials of the government, to swear to support it. Surely the oath is not more binding on one class of officials than on another. Let us repeat our experiment and substitute the executive for the judiciary in two more paragraphs of this fundamental decision:

> Why does . . . [the President] swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.[5]

It is hard to see why this is less reasonable as a matter of constitutional law than the original version. If Chief Justice Marshall's reasoning was correct for the judiciary, clearly it is also correct for the executive and the legislature.

My argument that the Congress and the Executive also have responsibilities for preserving and protecting the Constitution, although it would have been acceptable to such liberals as Justices Black and Douglas in the late thirties, will be vigorously contested today. The argument which may be offered against it is that there must be a single ultimate authority to decide constitutional problems, and that the Supreme Court is that authority. This can be divided into two parts, an argument that a single authority is logically necessary, and that the Constitution established such an authority in the Supreme Court. The first, or logical, argument, although superficially plausible, is fairly easily answered. It would, of course, be impossible to have two or three bodies each issuing authoritative interpretations of the Constitution if these interpretations were equally binding upon the citizen and likely to conflict. We are not, however, faced with a dilemma of choosing between two equally unattractive alternatives, the one involving multiple and possibly conflicting authorities with power to interpret the Constitution and the other involving a single arbitrary authority. If the founding fathers had seen the problem in this light they would surely not have set up an appointed body as the ultimate sovereign. They had just fought a war to free themselves from the control of appointive royal governors, and there is no reason to believe that they would have wished to place themselves and their descendants under the complete control of a body of men who were not removable no matter how bad their decisions.

THAT THE DRAFTERS of the Constitution did not even think in terms of giving ultimate power to the Court can be readily seen from the provision of the Constitution that "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Article III, Section 2.) The right of Congress to make exceptions in the jurisdiction of the Supreme Court, upheld by that Court in *Ex Parte McCardle*,[6] a case involving civil rights, is clearly inconsistent with the view that the Court is the ultimate authority on constitutional questions.

If we return to *Marbury v. Madison* we see that Marshall did not claim any sort of ultimate authority for the Court. He simply said that where he thought the Constitution and a law conflicted he would carry out his oath of office and refuse to enforce the law. Until very recently this purely negative concept of the duty of the courts in constitutional questions was the dominant theory. The whole subject was traditionally described under the rubric of "judicial review," and that review amounted to "little more than the negative power to disregard an unconstitutional enactment."[7] This negative view of the problem of protecting the Constitution raises none of the logical problems of conflict-

[5] 5 U. S. (1 Cranch) at 180.

[6] 74 U. S. (7 Wall.) 506 (1868).

[7] Massachusetts v. Mellon, 262 U. S. 447, 488 (1923).

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ing determinations of constitutionality while at the same time avoiding the grant of ultimate power to one body. Normally any act of the government will require the co-operation of two or three of the main branches of government. If the act initiated by one branch is constitutional, the other branches are required to co-operate. If the initial act, on the other hand, is unconstitutional then the other branches are required by the oaths that their officers have taken to uphold the Constitution, to refuse to play any part in destroying the constitutional guarantees. This is the famous system of "checks and balances" which the drafters of the Constitution thought more desirable than dependence upon the good will and self-restraint of a small body of men.

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In practice, of course, the bodies initiating action in our system have normally been the legislature and the executive. The courts, until very recently, seldom took the initiative. This meant that most cases in point have been resolved through refusal by the courts to carry out unconstitutional acts of the legislature rather than through refusal by the legislature or executive to enforce unconstitutional decisions of the courts. The only major effort at judicial legislation prior to the last two decades was the Dred Scott case, which was, quite rightly, not enforced by many state governments and reversed "on the slight, bare slopes of Gettysburg." However, the recent outburst of judicial activism, which contrasts so strongly with the restraint characterizing previous courts even in the exercise of their negative power of judicial review, has raised an essentially new problem. Although the court still talks the language of simply applying the Constitution, it now acts as though it were a sort of superior legislature, not only imposing new laws, but also actually changing the Constitution by its decisions. No longer are constitutional decisions largely limited to refusals to enforce laws; they now frequently take the form of positive orders to other branches of the government and general rules for the control of citizens. Most of the civil rights cases and the reapportionment decisions are of this nature. Under these circumstances the right of the other branches to "check" the Supreme Court by refusing to apply its decisions when they violate the Constitution, a right long held in abeyance, becomes a matter of first importance.

Even if a supreme authority is not logically necessary in a system where each branch checks the others, it might still be true that the Constitution did establish such an ultimate arbiter in the form of the Supreme Court. This is, however, not the case, for there is nothing in the language of Article III of the Constitution which directly assigns to the Supreme Court any special duties with respect to the Constitution. If the Constitution conferred such special powers on the Court it did so implicitly, not explicitly; and it is hard to see where supreme power is implied for the Supreme Court. The judiciary is given "the judicial power of the United States." If they had been written in 1964, these words might be construed as implying arbitrary power of the Court to interpret the Constitution in any way it sees fit. But this mythological view of judicial power was not held in 1789. Nor did Marshall claim such power. He made only the following claim:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[8]

The statement of the role of the Court is acceptable; but it is also a duty of the executive to decide which of two conflicting laws is to be enforced, especially if one of these laws is the Constitution itself.

THE PRESIDENT HOLDS a unique status in that the Constitution itself specifies the content of the oath he must take on assuming office. This oath concludes with the words "[I] will, to the

[8] 5 U. S. (1 Cranch) at 178.

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best of my Ability, preserve, protect, and defend the Constitution of the United States." The obligation devolving on the President is clearly more weighty than the mere duty "to support" the Constitution, the requirement specified for oaths to be subscribed to by all other officials including judges. In carrying out his duty to execute the laws, the President must, of course, make constitutional decisions. If he feels that a given law enacted by Congress is unconstitutional, he may veto it; and this is one of the reasons given by presidents for their vetoes. If an unconstitutional law is passed, he must follow his oath and refuse to enforce it. This, although it may appear novel, is simply a description of what the President has always done. The Attorney General frequently considers the constitutionality of various laws, and his rulings on such points are normally accepted by the executive arm.

A particularly interesting case has arisen in recent years with respect to defense appropriations. Congress quite frequently feels that some certain arm or weapon is more important than the executive believes. Congress has, therefore, tried to get the executive to spend more money than the Department of Defense requests for such arms, and it may put a specific provision in the appropriation act requiring that the money be spent. The intent of such provisions is to give the President the choice of vetoing the entire defense appropriation or spending the money. Since Truman, however, the executive branch has uniformly held that such provisions are unconstitutional and hence has refused to carry them out. No court was involved in this highly important decision on a constitutional issue, and clearly it does not involve any usurpation of judicial power by the executive.

The members of Congress are not only sworn to support the Constitution; they also tend to run heavily to lawyers, and hence are apt to be interested in constitutional questions. The question of whether a given measure is constitutional is frequently discussed on the floor of the two houses, and a consensus seems to prevail to the effect that unconstitutional acts should not be passed. If the President requests legislation which appears to the members of Congress to be unconstitutional, they should refuse to pass it. It is always a little hard to determine exactly why Congress has taken any given action since there will normally be many different arguments offered by different members; but it is reasonably clear that there have been occasions when legislation has been rejected or modified for constitutional reasons. Again this involves no usurpation of judicial prerogatives. Congress is unique in that the Constitution specifically limits its power to making "Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States. . . ." Surely Congressmen asked to appropriate money for a purpose they believe unconstitutional may refuse. The view that Congress shall refrain from considering constitutional questions is not only absurd but also directly contrary to the established practice of our government.

Thus it is not only the Constitution, but long established practice, which gives to each of the three branches of the government the right to check the others if their acts are unconstitutional. The Supreme Court has seldom experienced such checks, but this simply reflects the fact that it has seldom taken positive action which required checking. Surely the restraint of previous judges does not give the present Court positive powers to do anything it wishes.

The well thought out plan of checks and balances is completely negated by the myth of judicial supremacy. Only if we feel assured that the Justices are not like other men, that they neither make mistakes nor try to extend their authority, will we favor a system giving them ultimate power. Our officials are sworn to uphold the Constitution, not the Supreme Court. Where judicial decisions conflict with the Constitution they should keep their oath and uphold the Constitution. The statesmen who drew up our Constitution did not leave the protection of our liberties solely to nine fallible men.

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Prospects for South Africa

DENIS V. COWEN

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THIS PAPER IS concerned with the political future of South Africa; that is to say, the future of some 16 million people occupying a territory approximately one-third the size of the United States, in one of the most richly endowed, beautiful and temperate zones of the earth's surface. These 16 million people, my fellow South African citizens, are quite normal, friendly human beings, with ordinary human virtues and vices; but they are troubled and perplexed — and in varying degrees, humbled — by the tremendous challenge in human relations which faces them.

Most readers are aware of the broad outlines of the South African government's racial policy — a policy which has excited so much attention and criticism in the international community that I need do little more than mention its essential features.

The South African government of the day — which has been in power for some sixteen years — does not believe that there is any future for any political system whereunder the various racial and cultural groups in South Africa would live together on terms of equality in one undivided country. Some 10.5 million blacks of the full blood, belonging to several tribes, speaking several Bantu languages, and at varying stages of development, cannot, they say, form a stable political structure on terms of equality with 3.5 million whites who wish to preserve their own cultural heritage. In addition, there are a half-million Asians and 1.5 million people of mixed blood, who live mainly in Cape Province. Whites, for their part, belong to two groups having much in common, but yet they each have their distinctive character; 60 per cent (nearly 2 million) are Afrikaans-speaking (i.e., their home language is Afrikaans, though most of them speak English as well), and Calvinist in religion. The remaining 40 per cent are primarily English-speaking and either more tolerantly Protestant (Episcopalian, Presbyterian, Congregationalist), or Roman Catholic in religion. About 5 per cent of the whites are Jewish. In short, not only is South Africa multi-racial; it is multi-cultural.

Given such a population structure, any attempt to share political power between whites and non-whites in a single political system is seen by most whites as involving self-immolation. "One man, one vote" in an undivided society, or anything which may lead to it, it is said, would involve cultural suicide and the eventual abandonment of a way of life. The blacks, it is argued, would "swamp" the whites; and what is more, as they are on the whole the "have-nots," the character of the economy would soon be changed out of all recognition.

Denis V. Cowen is currently Professor of Law at the University of Chicago Law School. He was formerly Dean of the Law Faculty at the University of Cape Town.

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PLACING NO FAITH in constitutional guarantees and devices for minority protection — which have tended in many parts of Africa, and indeed in South Africa itself, to be mere scraps of paper —the overwhelming majority of South African whites accordingly feel that there is no health in any deliberate attempt to bring about a common political society between blacks and whites. In this predicament, the better hope, they argue, lies in the opposite direction — it should be, in short, in the direction of "separate development" of the main racial groups in their own homelands, leading to eventual independence or partition. At the same time, it is recognized that the various population groups — black and white — are now, and are likely to remain, very largely economically interdependent, whatever their political future may be. European nations, it is argued, are a similar case; and the Common Market is taking care of the resulting organizational problem. Accordingly, Dr. Verwoerd would like to see political separation, coupled at the same time with increasing economic integration, not only between the population groups of South Africa, but also between the various South African groups, on the one hand, and the African states north of the Limpopo, on the other.

That, in basic outline, is Dr. Verwoerd's plan for separate development; stated, I hope, as fairly — though not as eloquently — as he would state it in equally short compass. Nothing would be easier than to show the defects in this policy. Indeed, even its ardent supporters recognize that, given the most favorable circumstances, the achievement of Dr. Verwoerd's goals would take many years; would involve great sacrifices on the part of the whites, if the eventual partition is to be fair; and that in the intervening years there would be many injustices and anomalies.

Meanwhile, under the guidance of a very efficient administration (as efficient as any in South Africa's history) the country continues to prosper — even to boom — economically. Industrially and economically speaking, South Africa is the continent's giant, so far in advance of all the rest that economists do not even group South Africa along with other African territories. Much the same is true of education and the organization of the learned professions.

But beneath the fair surface there is tension; and the cost of implementing the government's racial policy is very high in terms of human suffering. Having written several detailed indictments of the policy myself,[1] it is not my intention to repeat the performance now. I have not changed my convictions about the basic immorality of racialism. Nor have I changed my opinion about the economic and political arrangements in South Africa. I still hope and believe that one day racial tension will no longer exist in a fully integrated South Africa. At this stage, however, I think that it is more profitable to call attention to certain facts which tend to be overlooked in discussions about South Africa; to say why I believe that my country has a very good chance of pulling through to the achievement of a satisfactory future; and to give some idea of what may, I think, be done to help.

One will appreciate that I speak without any brief from either the exponents or the critics of the South African government's policies. The only brief I hold is *for* my country, and *all* its people.

Perhaps the best way to present my subject is to deal with it under three headings.

First, I would like to review briefly why it is that South Africa matters; why her political future deserves the very serious attention and encouragement of people beyond her borders.

Second, I would invite the reader to look at the South African scene from the point of view of what, in the past, has actually happened, and what, in the future, is likely to happen—as distinct from what some of us would have liked to have seen, or may yet wish to see take place. In other words, I suggest that it

[1] See, e.g. "Call for a Dialogue in South Africa," *New York Times*, May 17, 1964, Sec. 6, p. 19 *et seq.* *The Foundations of Freedom* (Oxford: Oxford University Press, 1961). *Liberty, Equality, Fraternity Today* (Johannesburg: South Africa Institute of Race Relations, 1961).

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may be useful to focus attention on the actual facts, and try to predict probable events as distinct from speculating as to what *ought* to have happened and what *ought* yet to be. Under this heading, it is my intention to place before you — somewhat bluntly and flat-footedly —a series of axioms about South Africa.

Third, while concentrating on the "is," and the "likely to be," rather than the "ought to be," it may be useful for me to suggest a few maxims concerning what may be done to help the situation in South Africa; and, in particular, what sort of action should be avoided, as being calculated to aggravate the present distemper rather than cure it, for I would not like it to be thought that we should have no interest in the sphere of the "ought-to-be."

I have been induced to adopt this method of treatment (that is to say, the formulation of axioms and maxims), because a similar procedure was recently used in an article by Mr. Philip Mason, in the October 1964 issue of *Foreign Affairs*.[2] With some of Mr. Mason's conclusions I am in complete agreement. From others, however, I would differ sharply. Nevertheless, I would commend his article to you, suggesting my own remarks as required supplementary — dare I say, corrective — reading!

AT THE LEVEL of international power politics, South Africa's significance is considerable, although she is not yet a member of the nuclear club. At summit conferences, and notably in the lobbies of the United Nations, a determined effort is being made by the Afro-Asian bloc to bring the South African government to its knees, as the saying goes. More particularly, Britain and the United States, South Africa's two largest trading partners, are being told that continued trade with South Africa bolsters up and encourages a regime which the Afro-Asian nations regard as an affront to their dignity and self respect. Accordingly, they are asking for a full scale trade boycott, backed by a blockade. They say, quite bluntly, that Britain and the United States must choose between them and South Africa.

The threat must be taken seriously. Not only would it be difficult to overestimate the determination of the Afro-Asian bloc to bring about a change in the political structure of South Africa, but a suitable occasion for involving the older and greater powers may actually present itself in the near future. Thus, it is quite possible (some say it is very probable) that next year the International Court at the Hague may feel itself compelled to give judgment against South Africa in regard to her administration of the South West African Mandate, and to call upon Dr. Verwoerd's government to abandon their racial policies in that territory. It is by no means clear that the judgment will, in fact, go against South Africa; but if it does, and if South Africa refuses to comply with the court's order (which, again, is not a foregone conclusion), the United States and Britain— being pledged to uphold the rule of law —might find it difficult to resist a call for immediate sanctions; and this could be the flash point for a major international confrontation.

In any event, whichever way the South West African judgment goes, the Afro-Asian bloc — aided and abetted by Russia and China, who seek, I believe quite cynically, merely to make political capital out of their "support" in terms of the overall "cold war" — will continue to press for international intervention in South Africa. In a world bemused with argument and agitation about skin color, South Africa has become a convenient pawn in a power struggle towards ends which have nothing to do with color.

Already there have been several resolutions in the General Assembly which make it abundantly clear that the South West African issue is only *one* string in the bow of the Afro-Asian block. To change the metaphor, it is no more than a convenient *casus belli*. Whatever happens in the World Court on that issue,

[2] P. Mason, "South Africa and the World, Some Maxims and Axioms," *Foreign Affairs*, Oct. 1964, p. 150.

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they insist that there are bigger issues at stake. South Africa, they assert, presents a unique case in the modern world of a denial of human rights on the score of color. It is said that the denial of rights is so flagrant and unique that the issue cannot possibly be regarded as a domestic one; that it is, accordingly, the legitimate business of the world community; and, more particularly, the duty of the world community to put an end to the outrage.

It may be observed that quite apart from this very high-tensioned legal and moral question, South Africa also matters at the international level because it is the world's greatest producer of gold, uranium, and diamonds; one of the world's greatest producers of wool, and possesses vast deposits of coal and iron ore and other minerals. In addition, its industrial growth in recent decades has been phenomenal. None of the larger powers can be indifferent to the question of who controls this wealth and for what purpose. Indeed, only a few months ago, Dr. Nkrumah of Ghana let one of his cats out of one of his bags when he declared that South Africa's mineral wealth rightly belongs to black Africans, to be shared north of the Limpopo.[3]

At a very much deeper level, South Africa matters, too, because it presents the world's race and color problems in microcosm. If these problems can be satisfactorily resolved in South Africa — and when I say "satisfactorily," I mean at depth, with roots in sincere conviction, and not merely on the surface, or in unwilling token compliance with law — if these problems can be solved in South Africa, something enduring will have been wrought for the benefit of the world as a whole. In this regard, one will recall that the ratio between whites and non-whites in South Africa is approximately the same as the overall world ratio. Moreover, pressures and tensions are felt at the same points — that is to say, in regard to opportunities for education, jobs, housing, social and marriage relations, and in the churches.

THUS FAR I HAVE emphasized South Africa's significance from the point of view of shared international concern. At the same time, it should be borne in mind that South African affairs may also —all too easily and all too unfortunately — become part of the domestic political power struggle in the U.S. and Great Britain. One may recall how Israel's affairs long bedeviled local American politics. It should not be overlooked that today American Negroes not only hold something very like a balance of domestic political power, but they are tending increasingly to identify their own "freedom fight" with the "freedom fight" of their "black brothers in Africa." (I am quoting Dr. Martin Luther King.) Indeed, on this whole aspect, Dr. King's recent acceptance speech, when receiving the Nobel Peace Prize, is full of significance.[4]

And now having tried to put my subject into broad perspective, it is time for me to get down to the facts. I turn, therefore, to the enumeration of a few suggested axioms — or brief statements —concerning the essential and often overlooked facts of South African life.

First Axiom: My first axiom relates to the importance of cleaving to *facts*, as distinct from myths, illusions, and falsehoods about South Africa. Moreover, it is essential not only to cleave to facts, but to have regard to *all* the relevant facts, and not merely a selected group of facts; and, further, it is no less essential to weigh the facts *dispassionately*, and in full perspective. All this is emphatically not easy, because — and here is my first axiom — the South African situation, or racial predicament, is highly *complex*, shot through with deep emotion, conditioned by historical events, and, in the result, one may be sure that the surface appearance is almost invariably misleading.

Too many of the alleged friends of liberalism in the modern world approach the facts of the South African racial situation (and indeed other racial situations) with *fixed inflexible ideas*—sometimes based on sheer expediency; often

[3] *New York Times*, July 10, 1964, p. 2.

[4] *New York Times*, Dec. 11, 1964, p. 33.

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with no rationally based or other deep-seated convictions; yet they cling to and brandish their ideas with a bigotry, self-righteousness, rancor, and prejudice, which is the very negation of true liberalism.

Beware of the professional "do gooders"; also beware of both the professional apologists for, and the professional critics of, South Africa. Both are likely to be wide of the mark.

To hear some of the white-washers of South Africa talk, one would imagine that the country has no problems *at all.* They fool nobody but themselves. On the other hand, to hear some of its traducers hold forth, one would imagine that the whites spend all their time killing and torturing the blacks.

Second Axiom: South Africa presents a situation to live with and improve, not a "problem" capable of instant solution.

Most of South Africa's critics, well meaning though they may be, tend to overlook the magnitude and frightful difficulty of the human situation with which we are concerned. We speak of a "color problem" as if one could "solve" (that is to say, "remove") it by an effort of the will and the intelligence. This is almost pathetically naive! There is no room here for easy generalizations in terms of "good guys and bad guys." Nor is there any one magic formula which will dissolve the dark clouds. Certainly "one man—one vote" is not the answer—potent as that slogan may have been in some parts of Africa as a weapon in the early stages of the struggle for political power or emancipation, as distinct from the achievement of prosperity or true freedom. Dr. Nkrumah's "Seek ye first the political Kingdom and all else will be added unto you" is not only sacriligious, but also over-simplistic.

We should be constantly on guard against over-simplifying the South African scene in terms of one issue. The black man's effort to better himself in the modern world is often regarded as being simply and solely a color struggle —an effort to erase color-prejudice. This is an over-simplification. It is probably nearer the mark to suggest that what is taking place the world over is a vast revolution in which social, economic, and educational opportunities are being redistributed. The non-whites are, on the whole, the "have-nots" and color tends to be the external and visible sign of a pressure point in a social and economic process. The process itself, however, is not exclusively, and maybe not even basically, concerned with color.

Let me hasten to add that when I say that South Africa's predicament may have to be "lived with" rather than "solved," I am not being an apologist for much that is deplorable in present government policies. I say this because in the semi-lunacy which pervades some so-called "liberal" circles, if one does not support violent and bloody revolution in South Africa, one tends to be sworn at as being a "white supremacist."

Nor am I a complacent believer in a policy of drift, against which Mr. Mason rightly inveighs. I do not believe that the mere passage of time necessarily brings about an improvement in human affairs. On the contrary, it is obvious that human situations may be lived with more or less successfully. And South Africa is not being all that successful!

Again, I do not advocate inaction. But on the other hand, I most emphatically repudiate the proposition that *any* action is better than no action. What we need is *wise* action — effective action— about which I shall have a little to say under the heading of Maxims. Wisdom is often the product of old fashioned and (among the shallow) discredited virtues, such as honesty and humility.

Third Axiom: Bad as apartheid, or separate development, are — and, let me repeat, I would not even try to defend any of the acts of stupidity and cruelty which have been perpetrated in its name —no one has yet come up with an alternative, *which would be acceptable to both whites and non-whites.* In fact, apartheid, like democracy, may be the worst form of government; but at the moment, *as a matter of practical politics,* there is nothing better in sight. Indeed,

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those who are serious-minded and sincere enough to get beyond vague generalities (such as, *something* must be done!), differ hopelessly as to what *specific* form of government should replace the present dispensation.[5] The Afro-Asian bloc gets no further than the proposition: Leave the basic political structure to the decision of all the people of South Africa on a one man—one vote basis at a national convention. And this the whites will not soon or willingly accept. Any proposed change in South Africa must be acceptable to the whites as well as to the blacks if peace and inter-racial harmony are to result.

Fourth Axiom: No alternative blueprint for South Africa's future has any chance of *sticking* unless the whites, as well as the non-whites, want it and willingly accept it.

In elaboration of this axiom, I would remind you that in no sense of the term are the 3.5 million whites in South Africa colonists. Many of them have been in the country as long as the white man has been in America. They have no other home. What is more, they have as good a title to some of the country as the Bantu-speaking settlers, who arrived at about the same time from the north. The whites are grimly determinded to stay on in South Africa, and I have no doubt that they will do so. For one thing, the dominant Afrikaans-speaking group have their own language, their own church, and their own mores, for the preservation of which they fought grimly over a period of many generations. They will fight to the death for them now. In this they would, I believe, be joined by the English-speaking whites.

Indeed, the population as a whole — white as well as non-white — are bent on *working out their own destiny*. What is more, despite talk to the contrary, I believe that many South African non-whites would resent outside interference as bitterly as the whites.

Fifth Axiom: There is no likelihood of a local black revolution ever developing or succeeding in South Africa, unless it is aided and abetted by the great powers abroad. Certainly there will be no Congo, no Algeria, no Zanzibar in South Africa unless the great powers, and in particular the United States and Great Britain, deliberately cripple South Africa's economy and her government.

My reasons for this conclusion are:

(a) The South African whites are strong and determined. Rightly or wrongly, they believe that for them all is at stake. Above all, they believe in themselves. However perplexed they may be by their problems, they are tough and effective.

(b) The vital immediate decisions concerning South Africa are being taken and will, during the foreseeable future, continue to be taken *in South Africa*. In other words, the kind of withdrawal action which an external metropolitan power took in respect of, say, the Congo, Algeria, or Zanzibar, is simply "not on" in South Africa. Mr. Wilson, the present Prime Minister of England, may, perhaps, call the vital shots in Southern Rhodesia. I cannot see his doing so in South Africa.

(c) The more aggressive local opposition to apartheid has either been silenced or induced to acquiesce in the emerging patterns now being devised very largely by the whites. At the same time, I am bound to confess that I regard this silencing of black leadership as a seriously unhealthy factor. I am worried by the fact that so many of the articulate black political leaders are in jail, both because (quite apart from the humanities) I believe it necessary to encourage the fullest dialogue at all levels, and because a suppressed political view-point tends to become a political cancer. But at present I am concerned to state facts, not evaluate them.

(d) The spread of wealth in South Africa (uneven as it is between black and white) and, especially, the geography of South Africa are unfavorable to revolution. To begin with, economically,

[5] My own formula for a non-racial, fully democratic federal form of government, with a court-enforced bill of rights—elaborated at length in my book *Foundations of Freedom*—is one of several proposed "alternatives" to the present dispensation, which as yet has made no serious impact.

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the whites and the non-whites are too heavily interdependent. Secondly, the overall economic conditions are not nearly bad enough for revolution. Compared with black states in the North, and with many other states in the world, South Africa's non-whites are indeed, on the whole, economically fairly well off. Thirdly, the South African terrain is open and free from jungle; and, finally, the bland, sunny weather is just too good to encourage and sustain a violent revolution.

The point I am making is that South African affairs *need not* necessarily come to a crisis point, unless this is deliberately engineered by the great powers.

Sixth Axiom: If the great powers were to heed the Afro-Asian call to bring the South African government to its knees, the consequence would be extremely grave. Assuming that economic sanctions (and they would have to be universal and total), coupled with a naval blockade, *could* bring South Africa to her knees (and that is a very big assumption), how thereafter, I ask, in the ensuing chaos, would the country be governed? An immediate consequence, I believe, would be the need for indefinite international police action. White resistance would be stiffened and great and lasting bitterness would ensue. Not only would it be difficult for foreign powers to maintain peace in the presence of an embittered white minority, with the black majority clamoring for change, but the problem of restoring South Africa as a peaceful, productive, and independent country would, to say the least, be most formidable.

Seventh Axiom: One of the greatest threats to a sane outcome in South Africa — as, indeed, to sanity and health anywhere in Africa — is the ugly growth of anti-whiteism in the modern world. The whites, no doubt, have done much to bring this upon themselves, but it is often despicably nourished by white "freedom fighters" (for a variety of their own reasons). White racism is infernally evil; black racism, let me add, is no less evil — a point which I was delighted to hear Mr. Adlai Stevenson make (at long last) in the United Nations recently.[6]

Eighth Axiom: My eighth and last axiom is perhaps the most important. Most people in South Africa — including, let me emphasize, a great many Afrikaners — recognize that changes in South Africa's political structure must come about. The white man knows and concedes that he cannot survive as a dominating and privileged minority. But, while the outside world clamors for change, *it is all too often overlooked that changes are, in fact, taking place.*

Barely three years ago, in my book *The Foundations of Freedom,* I criticized the Bantustan experiment in the Transkei on the score that it was retrograde and undemocratic, more particularly because the idea of popular voting was entirely excluded as being alien to the Bantu mentality.

The government's policy has since changed radically; under the revised Transkeian constitution voting is now allowed to take place on a substantial scale — a definite step, in my view, in the right direction; and so this particular piece of criticism largely falls away.

EVIDENCE OF CHANGE for the better is manifest to anyone who is honest enough to keep his eyes open, and humble enough not to expect the immediate advent of the millenium.

This is especially true in South Africa's industrial life; African minimum wages are rising steadily; last February the Minister of Labour stated in the Senate that there would be no ceiling to the skills Africans would be allowed to acquire in the border areas (a change in policy which has enormous possibilities); and, in the big cities, the wastefulness and inequity of "job reservation" is beginning to break down in the face of economic realities.

Again, a few years ago, it would have been unthinkable for Nationalist newspapers to refer to Africans as "Mr." and "Mrs." This is now being done. This may be a trivial point to those who have

[6] *New York Times,* Dec. 15, 1964, p. 16.

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no experience of, or sympathy with, South Africa; but for anyone familiar with the history of this country, it is by no means an insignificant change, and — to many — most encouraging.

In short, the situation still holds within it elements of fluidity. While some doors are shutting, others are opening.

I have said that in my view the South African situation has within it elements of fluidity. It is of cardinal importance to keep the situation fluid, and to avoid inducing an overall rigidity through malicious action, or short-sighted action. What, then, can be done to help; and what in the first place, should be avoided? These questions bring me to the enumeration of a few maxims.

First Maxim: There is no health in attempting to fight evil with evil. More particularly, attempts to engineer internal violence, sabotage, and bloodshed can have no beneficial effect. Those who have engineered or condoned murder and violence — often from the safety of sniping points abroad—have achieved little more than trouble and imprisonment for young men and women, deceived by their charm and rhetoric, but left behind to face the music. What is more, they have provided an excuse for increasingly drastic laws. Indeed, there is much truth in the old French proverb that "without the gift of grace, men tend to become like the evil they oppose."

Second Maxim: Attempts to pull South Africa and her government to their knees by isolation, boycotting, etc., are, in my view, mischevious and irresponsible — unless accompanied by a practical and acceptable alternative form of government. As to such an alternative, the boycotters are notoriously silent.

Third Maxim: Just as black racism is not the antidote for white racism, so too "appeasement" is not the antidote for black racism. You may be sure that no black racist would admire or like the United States or Britain any more for succumbing to the blackmail implicit in the now current Afro-Asian threat: "Choose between our friendship (no matter what the merits of the particular issue may be) or South Africa's friendship." The United States and Britain must be prepared to tell black men that they are often as wrong as white men — precisely because they *are* men; that each specific issue should be decided on its specific merits, and not by reference to an allegedly universal but crude yardstick: "If you are not against South Africa's government you are against us."

I am aware that there are some black racists who argue that there is no room for the whites anywhere in Africa. And it is possible that this may yet prove to be the real and horrible issue. "Africa for black Africans!" Happily, this is not the view of most non-whites in South Africa. What South African non-whites understandably desire in their country is a more equitable sharing of power and opportunities, which is not the same thing as a rejection of the whites.

Fourth Maxim: Mere negative shibboleths like "abandon apartheid" are not going to get anyone anywhere. Even the more positive call for a national convention to work out a new deal for South Africa is not really helpful, unless one has workable ideas about what is to happen if the government of the day, of what is after all still a sovereign state, refuses to summon it; and even more to the point, what is to happen if the delegates to such a convention do not agree on a new dispensation. On these specific but crucial points, one will again find the busybodies conspicuously silent or unhelpful.

Fifth Maxim: If international intervention can be justified at all in South Africa, it ought to be justified by reference to an issue of real principle — as distinct from mere expediency — and, what is more, in the application of any genuine principle, there can be no room for "double standards."

In this regard, I was disappointed by Mr. Mason's article. Mr. Mason argues that South Africa's race relations, unlike race relations anywhere else in the world, should not be regarded as a matter of domestic jurisdiction, but are the world's legitimate business because, he says, South Africa is *uniquely* guilty of a denial of human rights. South Africa

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alone uses the legal process to accord different treatment to men by reason *only* of their color — over which they have no control.

There are several things very wrong with Mr. Mason's argument.

In the first place, color discrimination, bad as it is, is not the only kind of denial of human rights which should excite Mr. Mason's indignation. Hungary and Ghana have, it would seem, been guilty of some fairly massive denials of human rights in recent years. Why single South Africa out as a scapegoat?

Secondly, it is by no means the case that South Africa alone is guilty of racial discrimination, *backed by law*. The Indian Tamils, not so long ago, were ruthlessly disenfranchised by law in Ceylon; and even Denmark draws certain important distinctions between Danes and Greenlanders. Moreover, and this is even more to the point, the absence of racially discriminatory laws from the statute book does not afford an exoneration from vicious racialism in men's hearts and in actual practice. Indeed, when one looks at the facts — as distinct from mere theory and black-letter law — the body of sinners swells mightily, as you will discover if you talk to Asians in Zanzibar and throughout East Africa; Tamils in Ceylon; Malays and Chinese in Malaya; and many dark-skinned people even in the United States and Britain.

I do not mention these facts because I believe that by saying "you too," one thereby finds an excuse for South Africa's sins. Why single South Africa out as a scapegoat, I ask again?

Thirdly, it must be remembered that the South African government quite seriously rejects the contention that it is guilty of a denial of human rights, when it regards racial origin as a legitimate criterion for distinguishing between human beings. Arguing that racial origins are relevant to legitimate governmental objectives in the particular circumstances of South Africa, it places reliance on something like the "separate but equal" doctrine which once obtained in the United States. If today South Africa is admittedly a unique exception in putting forward such an argument, her government would reply that unique problems call for unique remedies. Nowhere else, they contend, within the confines of one country, does one find a comparable racial pattern to that obtaining in South Africa — where the whites are outnumbered by three to one.

I DO NOT PERSONALLY subscribe to the South African argument. On the contrary, I oppose it for reasons which I have set out at length in another place. My point here is simply that it calls for a serious answer, in the course of which the issue of *bona fides* — that of South Africa as well as that of her critics — may have to be faced.

Fourthly, the attempt to find something unique about South Africa's case is to miss a golden opportunity to internationalize the problem of race-relations and human rights — whenever and wherever that problem is to be found; and to internationalize it in a mature and effective way.

For some years it has been recognized among international lawyers that the whole argument about the right of a sovereign state to do what it will with its own subjects within its own boundaries is becoming more and more out of date. What is needed is the encouragement and growth of this point of view; and the rededication and strengthening of the United Nations as a more clear-sighted, impartial, and rational enforcement-agency against the infringement of human rights, *wherever and whenever such infringements occur*. These goals, I believe, are not helped forward by the over-simplified and often hypocritical performance of singling out South Africa as the world's scapegoat. International law and organization are as yet a very tender plant. There is danger that its growth may be blighted by anger where coolness is needed, and by hate where there is need for compassion, charity, and above all honesty.

At the same time, there is much solid and worthwhile work that can be accom-

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plished quietly day by day. As an example of such work, I value none more highly than keeping the channels of communication open between South Africa and what is good and more humane in the world beyond her borders. In such an enterprise, international trade and commerce have, I believe, a vital role to play.

There is an honored place for "industrial statesmanship" in South Africa. The standard of living of the African can and should be raised; African wages can and should be substantially increased on the basis of merit alone (bringing them nearer to white wages) without making enterprises uneconomic; tactful pressures can be brought to bear to relax still further the immoral and economically wasteful "job reservation" laws; new skills and know-how can be imparted to Africans; in short, the vast productive talent and purchasing power of non-white South Africans are ready for full and fair development; and here I would place the emphasis on the role of fairness.

Only a person with a rigid a priori view would regard such suggestions as these as an indefensible bolstering up of Dr. Verwoerd's government. I prefer to regard it as what it more properly is — an opening up of new and wider horizons; an opportunity to demonstrate that efficiency and economic laws are color blind; an opportunity, in the constructive climate of commerce and industry, *and in day to day contact,* to treat men and women of all races as they should be treated, for let us never forget that there are no laws against charity — no laws capable of determining the look in a man's eye and the tone of his voice; and finally, such an enterprise may be an instrument helping to consolidate and cement the interdependence of all men everywhere.

The blacks and the whites not only need each other but are too strong to destroy each other. Indeed, South Africa may demonstrate that economic realities are more potent than political dogmas. Earlier I indicated that I was an integrationist. I am; and I would suggest that, paradoxical as it may seem, the quickest and best route to stable and lasting integration may be the seemingly longest and the least dramatic way. Economic integration, which Dr. Verwoerd favors, may, despite his apparent views to the contrary, not only make eventual political and social integration inevitable, but it may also produce the only safe foundation for its enduring stability.

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COMMUNICATION:

Note on the Election

BENJAMIN A. ROGGE

This communication was written in October before the close of the campaign.

THE ELECTION WILL probably be over by the time this reaches print, and conservatism as a potent political force will be dead. A fine man will have suffered a humiliating defeat and the modern-liberals in his party will be planning a ruthless purge of all those who were closely associated with his candidacy. The stage will have been set for the spectre of the "Goldwater debacle" to haunt the candidacy of every conservative for years to come.

In the meantime, his most passionate supporters will be using their special journals of opinion to vent their disappointment and bitterness in angry explanations of why it happened. Some will say that the campaign was badly conducted (which it was); some, that Goldwater was sabotaged by the modern-liberals of the press, radio and television (which he was); some, that he was defeated by one of the most effective, ruthless and corrupt politicians of the modern era (which may or may not true). The Minutemen will be laying in more rifles and the head of the John Birch Society will be proving to his own satisfaction that Goldwater's defeat was engineered by members of his own party, acting as conscious agents of the Communist conspiracy.

The truth, I suspect, lies quite elsewhere, and it is this possibility that I wish to explore. My own interpretation of the election can be simply stated: In a democratic society, under normal circumstances, no radical reorientation of social policy can be achieved by simple political organization and political action. Or to put it another way: As a general rule, for groups concerned with ultimate principles, elections just don't matter!

Let me put it still another way: Given the absence of any feeling of crisis in the American society and given the general acceptance of modern-liberalism by most Americans who count, Goldwater was foredoomed to crushing defeat. All of this was perfectly evident long before Goldwater was nominated. The great mistake was made, not during the campaign, but precisely when those conservatives who pride themselves on being activists and on "knowing how to get things done," decided that conservatism could be brought to America by what would amount to a political *coup*. Goldwater's own clear, good sense in thinking that the time was not ripe and that he could serve the cause better by continuing as Senator from Arizona was overpowered by the passion of the leaders of the Draft-Goldwater group and by their assurance that they had the know-how to get the job done.[1]

This assurance was bolstered by the ease with which the organization swept through the San Francisco Convention. But of course, it is no great task for a well-organized minority to take over a committee (and that is what a political convention most resembles); in fact, it is done every day.

Benjamin A. Rogge is Professor of Economics at Wabash College and an Editorial Advisor to *New Individualist Review*. He is co-author of the college textbook *Introduction to Economics*.

[1] See William A. Rusher, "Suite 3505: The Inside Story of How, When and Where the Goldwater Candidacy Was Conceived and Launched," *National Review*, Aug. 11, 1964, pp. 683-86.

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Goldwater might have won, had the country been plunged in a deep crisis of some kind at the time of the campaign. The victories of the Erhard "social market economy" in Germany in the late forties and more recently of the conservatives in Brazil were both made possible by the wide-spread sense of impending disaster in the societies involved. As John Maynard Keynes wrote with such excellent foresight in 1936: "At the present moment people are unusually expectant of a more fundamental diagnosis; more particularly ready to receive it; eager to try it out, if it should be even plausible."[2] Certainly the philosophical and political success of the ideas he presented in the book in which these words appear would attest to the significance of timing in attempts at radical change.

IN ANY CASE, it was precisely those who pride themselves on their practical wisdom who launched this most impractical and tragic of all modern political actions. *The country was simply not yet prepared to accept the conservative position. Goldwater's campaign could not build on any solid foundation of widely accepted ideas on society, economics, and the state.*

This became apparent the moment Goldwater made the slightest threatening gesture in the direction of any specific element of the welfare state, e.g., social security. The response was so immediate and frightening that his campaign strategy made an obvious switch, to concentrate on corruption in the Johnson administration and to promise a rather mystical rebirth of honesty and integrity in government and of "morality" in society.

As Hayek pointed out to us long ago, honesty and integrity in government are not functions of which party is in power, but of the power over economic decisions possessed by those in government.[3] But the people were not ready to reduce the power of government, and Goldwater and his advisors had no place else to go.

Nor could much be made out of foreign policy issues. Goldwater's interventionist posture in foreign affairs was just like Johnson's, only more so. The Goldwater principles of non-intervention and limited government on the domestic scene seemed to mix poorly with his promise of aggressive, interventionist action on the foreign scene. Whether he was more or less right than Johnson on foreign policy is not at issue. The question is whether there was any fundamental difference between the two in principle, and no such difference could be made to stick (not even the charge that Johnson was "soft on Communism").

Let me repeat: Goldwater lost because those who count in America weren't prepared to accept his ideas. The lesson would seem to be that *the real function of conservatism in America is not to try to win elections but to try to win converts.* The real battle is, as always, a battle of ideas. It matters less what name I drop into the ballot box on election day than what ideas I drop into the common pool during my lifetime.

Not a single one of the principles of limited government and individual freedom has been proved wrong by the Goldwater defeat (just as not a single one would have been proved right by a Goldwater victory). Nor has a single principle of the interventionist, welfare state been proved right by the Johnson victory.

Ideas are still evaluated by a different and more fundamental process, and perhaps it is time that we got back to work on that process. Let us forget for a while all attempts to be clever at political organization. Let us return to our problems of understanding, analysis, and clarity of exposition of the ideas of freedom. If we do our work well, we may some day be rewarded by the only lasting kind of political victory — a situation in which the ideas of freedom are so generally accepted in *both* parties that it will make little or no difference which one wins.

[2] J. M. Keynes, *The General Theory of Employment, Interest and Money* (New York: Harcourt, Brace, 1936), p. 383.

[3] F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), particularly the chapter on "Why the Worst Rise to the Top."

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Economic Liberalism in Post-War Germany

WILLIAM S. STOKES

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. . . I do not believe that the idea of a "German mircle" should be allowed to establish itself. What has taken place in Germany during the past nine years is anything but a miracle. It is the result of the honest efforts of a whole people who, in keeping with the principles of liberty, were given the opportunity of using personal initiative and human energy. If this German example has any value beyond the frontiers of the country it can only be that of proving to the world at large the blessings of both personal and economic freedom.

—Ludwig Erhard[1]

DR. THEODOR HEUSS, the distinguished first president of the West German Federal Republic, once addressed himself to the question as to why the German has worked hard in recent times. He concluded: "he has had to; there has been no other way for him to earn his living in a country so restricted in area."[2] On the other hand, Professor Louis L. Snyder advances the thesis that German history and social, economic, and political institutions have conditioned the German to an acceptance of authoritarianism. When the elite members of society order the German to work hard, he responds instantly by working hard.[3]

The German people are indeed hard-working in the West German Federal Republic. They are also imaginative, inventive, efficient, affluent, and humane. In a major policy address delivered by Dr. Gerhard Schröder, Federal Minister of Foreign Affairs, on April 3, 1964, certain facts were revealed which demonstrate clearly that economic progress is continuing in West Germany. Dr. Schröder said, among other things:

> With a gross national produce of some 380,000 million Deutschmarks we are at the head of all Common Market countries. Our share in the overall GNP of the EEC comes to

William S. Stokes is Senior Professor of Comparative Political Institutions at Claremont Men's College. He is a leading authority on international relations and a leading specialist in Latin American affairs.

[1] L. Erhard, *Prosperity Through Competition* (New York: Praeger, 1958), p. 116.

[2] T. Heuss, "German Character and History," *Perspective of Germany, Atlantic Monthly*, March 1957, p. 103.

[3] L. Snyder, *German Nationalism: The Tragedy of a People* (Harrisburg, Pa.: Stackpole, 1952), pp. 521, *passim*.

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almost 40 per cent. Our industrial production has increased by more than 180 per cent between 1950 and 1963, which means that, together with Japan and Italy, we top the list of all industrialized countries of the free world. As regards automobile production we are second only to the United States. The volume of our external trade amounts to 111,000 million Deutschmarks, which makes us today the world's second trading nation. In recent years, Germany alone has provided roughly twice as much development aid as all the Communist countries taken together.[4]

Although the explanations for German effectiveness in producing and distributing goods and services provided by Dr. Heuss and Professor Snyder are interesting and perhaps useful, they do not quite cover the situation. One can stand on the border between East and West Germany and, bereft of all of the quantification devices of behavioralists, observe the obvious differences in productivity in the two systems.[5] East Germany has the better agricultural land, yet weeds compete with the corn for nutrients in the soil. Even the very young and the very old willingly contribute to agricultural production in West Germany. Workers in the urban centers of East Germany are apathetic and careless, whereas standards of individual performance are high in West Germany. Although repeated so frequently that the whole world must know, it is nevertheless worth saying once more that the contrast between East and West Berlin proves strikingly the superiority of capitalism over socialism. The people in East Germany, of course, are just as German as those in the Federal Republic. If Dr. Heuss' thesis were valid, they should buzz with economic activity. On the other hand, if Professor Snyder's thesis were valid, they should respond with great zeal to the admonitions of their Communist leaders: They certainly live under one of the most authoritarian systems the world has ever known. But the fact is that the People's Democracy in East Germany lags far behind the West German Federal Republic in economic development.

This paper will attempt to show that economic reforms in the direction of a private enterprise, market-oriented economy were primarily responsible for the rapid economic development which has taken place in West Germany in recent years. Special attention must be given to Ludwig Erhard and to Wilhelm Röpke, since Erhard provided the leadership and the policies and Röpke many of the principles of classical liberalism which were embraced by the government of West Germany. Other men in public life in Western Europe have shared the views of Erhard and Röpke. Where they have been able to persuade their governments to move from the planned state (*dirigisme*) to economic liberalism, the results in terms of economic development have been similar. Such men include Reinhard Kamitz in Austria, Luigi Einaudi in Italy, Jacques Rueff of France, Walter Eucken, and Per Jacobsson.[6] It is not merely that economic liberalism has produced a dynamic and creative economic system, important as this fact is, but that the value implications of classical liberalism have extended to social and political life as well.

THE SPIRIT OF the White-Morgenthau Plan permeated the military occupation of Germany in its early years. It was planned that by 1949 Germany's overall industrial capacity would be reduced to about 50 to 55 per cent of the prewar 1938 level (excluding the construction and building materials industries). The "planned reduction in Germany's resources" would result in "a 30 per cent cut in the standard of living" as compared with the average standard of living before the war (1930-38).[7] About

[4] G. Schröder, "Germany's Position and Germany's Future," *The Bulletin* (Bonn: Press and Information Office of the German Federal Government), April 7, 1964.

[5] My statements here are based on personal observations in East and West Germany, East and West Berlin, summer, 1960.

[6] W. H. Chamberlin, "The Twilight of the Planners," *The Freeman*, May, 1964, pp. 23-24.

[7] Military Government of Germany, *Monthly Report of the Military Governor U. S. Zone: Reparations and Restitutions*, No. 9 (April 20, 1946), p. 1.

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6.6 million Germans were killed during the war, 3.5 million were disabled, and more than 15 million lost their homes.[8] Many parts of Germany were literally flattened. Although the initial policy was to disable rather than rebuild, the United States never intended to starve Germans to death. Between July 1, 1945, and March 31, 1950, total United States aid to West Germany was $3,801 million. As of July 31, 1952, the figure was somewhat greater. The United States claimed officially that the economic aid was used for purposes of achieving recovery in Germany. "In one form or another some 4 billions of dollars of United States aid have been applied to the economic recovery of West Germany in accordance with a policy of assistance to a defeated foe unduplicated in history and in violent contrast to the treatment accorded the areas of Germany under Soviet domination."[9] In a very broad sense, this statement may be accurate. However, the economic aid was not used to construct new industries or activate agriculture. "Nearly all of this aid represents the cost of procuring and shipping food, industrial raw materials and like commodities to Germany."[10] An official report of the Military Government describes United States policy as of 1946: "No attempt has been made to do extensive rebuilding while new construction has been absolutely prohibited."[11]

Although the United States government spent billions of dollars in Germany, policies of rationing, price control, centralized direction, restriction, and restraint — coupled with a failure to stabilize the monetary situation and manage the inflation — resulted in a virtually stagnated economy: "by the end of 1945 industrial output was no more than 25 per cent of 1936 and perhaps as little as 15 per cent of the highest wartime level."[12] The plants operating by the end of 1945 represented about 15 per cent of the total industrial establishments in the United States zone. However, such plants were operating at no more than 5 per cent of capacity.[13] About 20 per cent of the German population in the United States zone was receiving public assistance in some form or other.[14] Little improvement could be claimed in 1946. The official report for the period stated: "Industrial production is estimated at only 10-12 per cent of current capacity in the United States Zone."[15] As of late 1949, the economic situation in Berlin could only be described as deplorable. About 25 per cent of the residents were unemployed. The Soviets looted to a point of reducing industrial capacity about 80 per cent. By the end of 1949, 800,000 of the 2.1 million total population or 38 per cent were being subsidized by some form of public aid.[16]

Despite the heavy expenditures of United States dollars, few Germans ate well. In the first 21 months of the occupation, rations were as low as 1,180 calories per person per day; and in only 8 out of the 21 months did the rations reach 1,550 calories per day in the American zone.[17] Average weight continued to decline from sub-standard figures in June 1946, resulting in a nutritional status so low "as to entail excessive morbidity and

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[8] *Die Welt* (Hamburg), Aug. 24, 1959.

[9] Office of the U. S. High Commissioner for Germany, *Report on Germany, Sept. 21, 1949-July 31, 1952* (Washington, D. C.: U. S. Government Printing Office, 1952), p. v.

[10] *Ibid.*, p. 49.

[11] Military Government of Germany, *Monthly Report of the Military Governor, U. S. Zone: Manpower, Trade Unions and Working Conditions*, No. 8 (March 20, 1946), p. 8.

[12] Office of Military Government for Germany (U. S.), *Economic Developments Since Currency Reform*, Special Report of the Military Governor, November, 1948, p. 2.

[13] Military Government of Germany, *Monthly Report of the Military Governor, U. S. Zone: Report of the Military Governor*, No. 2 (Sept. 20, 1945), p. 10.

[14] Military Government of Germany, *Monthtly Report of the Military Governor, U. S. Zone: Public Welfare*, No. 2 (Sept. 20, 1945), p. 3.

[15] Military Government of Germany, *Monthly Report of the Military Governor, U. S. Zone: Report of the Military Governor*, No. 6, (Jan. 20, 1946), p. 5.

[16] Office of the U. S. High Commissioner for Germany, *1st Quarterly Report on Germany*, Sept. 21-Dec. 31, 1949 (Washington, D. C.: U. S. Government Printing Office, 1950), p. 34.

[17] Military Government of Germany, *Monthly Report of the Military Governor, U. S. Zone: Food and Agriculture*, No. 20 (March 1, 1946-Feb. 28, 1947), p. 1.

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mortality from infectious diseases in general and respiratory diseases in particular." The increased incidence of tuberculosis is explained by weight deficiency and overcrowding.[18]

In a speech delivered at Antwerp, Ludwig Erhard described the character of the German economy just prior to the currency reform:

> It was a time when most people did not want to believe that this experiment in currency and economic reform could succeed. It was a time when it was calculated that for every German there would be one plate every five years; a pair of shoes every twelve years; a suit every fifty years; that only every fifth infant would lie in its own napkins; and that only every third German would have a chance of being buried in his own coffin. That seemed to be the only life before us. This demonstrated the boundless delusion of planners that, on the basis of raw material stocks and other statistical data, the fate of a people could be determined for a long period in advance. These mechanists and *dirigstes* had absolutely no conception that, if a people were allowed once more to become aware of the value and worth of freedom, dynamic forces would be released.[19]

LUDWIG ERHARD, who was elected director of economic administration of the bi-zonal economic area on March 2, 1948, before becoming Minister of Economic Affairs in the new government and Chancellor in 1964, made clear in party circles and in the Military Government that he sought the destruction of planning and the institution of a market oriented economy. He found some opposition within his own party (the Christian Democratic Union or CDU-CSU). The Social Democratic Party (SPD), Marxist influenced and socialist in a formal, official fashion, naturally despised everything Erhard stood for in the field of economics. In addition, there was apparently a preponderance of economic planners, mostly United States university professors, acting as advisers in the Military Government. Although Erhard is a friend and supporter of the United States, various statements in one of his books suggest that he had a difficult time with the economists in the Military Government. For example, he says: "It was strictly laid down by the British and American control authorities that permission had to be obtained before any definite price changes could be made. The Allies never seemed to have thought it possible that someone could have the idea, not to alter price controls, but simply to remove them."[20]

Again, when Erhard put currency stability in the forefront of his objectives, the Allies "in a heated 'war of memoranda,' preferred full employment . . . [to] the stability of our currency . . . . nearly all forces joined for a general attack on the market economy, forgetting that only through greater productivity and free competition, on the basis of the stability of our money, could we secure our position in the world markets."[21] When Erhard wanted to lower certain taxes and to remit others in order to step up consumption and lighten the burden on the economy, the Allies "at first refused permission for this tax reform."[22] Other words and phrases in his book further indicate the reluctance of the American authorities to accept economic reform: "interventions from the Americans"; the Income Tax Law of April 23, 1950 "was finally sanctioned by the Allies"; etc.[23] The head of the E.C.A. mission in Germany expressed his distaste for what Erhard was doing by describing the German tax system as the most "anti-social in the world." Erhard says that "there was constant pressure from the U.S.A. to introduce controls . . . . "[24]

The first great reform which Erhard achieved was the Tripartite Currency Reform, officially promulgated June 18, 1948 (Military Government Law No. 61), effective June 20. The reform retired the

[18] Military Government of Germany, *Monthly Report of the Military Governor, U. S. Zone: Report of the Military Governor*, No. 13 (Aug. 20, 1946), p. 16.
[19] Erhard, *op. cit.*, p. 10.
[20] *Ibid.*, p. 14.
[21] *Ibid.*, pp. 32-33.
[22] *Ibid.*, p. 35.
[23] *Ibid.*, pp. 39, 41.
[24] *Ibid.*, p. 39.

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Reichsmark and established the Deutsche Mark. There would be DM 10 billion in the western zones (DM 11 billion on agreement of at least three-fourths of the Boards of Directors of the Bank Deutscher Länder of at least six of the Länder).[25]

From 1935 to 1945, the currency in circulation had increased from about RM 5 billion to over RM 50 billion. Bank deposits grew from about RM 30 billion to over RM 150 billion. Reich debt increased from RM 15 billion to RM 400 billion, "excluding war damage and other war-connected claims of RM 300 to 400 billion . . . . By 1946 the national income had been reduced from RM 60 billion to about RM 25 billion to 30 billion in 1936 prices." It was estimated that the black market controlled 50 to 60 per cent of production, with prices often fifty to several hundred times the official prices.[26]

Erhard quotes Jacques Rueff and Andre Piettre as to the immediate effect of the currency reform in West Germany, and the paragraph is worth quoting here:

> The black market suddenly disappeared. Shop windows were full of goods; factory chimneys were smoking; and the streets swarmed with lorries. Everywhere the noise of new buildings going up replaced the deathly silence of the ruins. If the state recovery was a surprise, its swiftness was even more so. In all sectors of economic life it began as the clocks struck on the day of currency reform. Only an eye-witness can give an account of the sudden effect currency reform had on the size of stocks and the wealth of goods on display. Shops filled up with goods from one day to the next; the factories began to work. On the eve of currency reform the Germans were aimlessly wandering about their towns in search of a few additional items of food. A day later they thought of nothing but producing them. One day apathy was mirrored on their faces while on the next a whole nation looked hopefully into the future.[27]

The bi-zonal index of industrial production increased from about 47 per cent of 1936 in May 1948 to 75 per cent in November[28] and to 140 per cent by mid-1952.[29] Lutz, Sohmen, Wright, and Röpke agree that currency reform was the beginning of the general policy of freedom of economic opportunity (*Gewerbefreiheit*) which, year after year, has continued to produce highly satisfactory results.[30]

Wilhelm Röpke has provided the best description of the nature of the economic reforms:

> The essence of the German economic reform corresponds to the sickness which it was intended to cure. If the sickness was that combination of collectivism and inflation which we have designated as repressed inflation, the therapy for it had to consist, on the one hand, in the elimination of inflationary pressure and, on the other hand, in the elimination of the apparatus of repression (maximum prices, rationing, controls, and other interferences with free prices) and the restoration of market freedom, free prices, competition, and entrepreneurial incentives. Freedom in the realm of goods, discipline in the realm of money — those were the two principles upon which rested the German economic revival from 1948 onwards, and they have remained the foundation of German prosperity in spite of all the many concessions made to interventionism and the welfare state.
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> The reform of 1948 was constituted, then, of two parts: the overcoming of inflation and the dismantling of the apparatus of repression. The first was accomplished by the monetary reform, the second by the economic reform represented in the res-

[25] Office of Military Government for Germany (U. S.), *Economic Developments since Currency Reform*, pp. 3-4.

[26] Office of Military Government for Germany (U. S.), *Monthly Report of the Military Governor: Report of the Military Governor*, No. 36 (June, 1948), p. 6.

[27] Erhard, *op. cit.*, p. 13.

[28] Office of Military Government for Germany (U. S.), *Economic Developments since Currency Reform*, p. 3.

[29] Office of the U. S. High Commissioner for Germany, *Report on Germany, Sept. 21, 1949-July 31, 1952*, p. 233.

[30] F. A. Lutz, "The German Currency Reform and the Revival of the German Economy," *Economica*, XVI (May, 1949), 122-42; E. Sohmen, "Competition and Growth: West Germany," *American Economic Review*, XLIX (December, 1959), 986-1003; D. M. Wright, *Post-War West German and United Kingdom Recovery* (Washington, D. C.: American Enterprise Association, 1957); W. Röpke, *Economics of the Free Society* (Chicago: Henry Regnery Co., 1963), esp. pp. 246-50.

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toration of the market economy. Thus were the twin pillars of genuine economic order reconstructed from the chaos and the paralysis of the inflationary planned economy: the steering and motive power of free prices and the stability of the value of money.[31]

It is hard not to agree with Röpke when he says that "here is to be found the most convincing case in all history against collectivism and inflationism and for market economy and monetary discipline."[32]

In my opinion, the most important result of currency reform was that human beings became important again. Individual dignity and self-respect were restored. It was the economic success of the early reforms, however, which provided the government with the means to behave in a humane manner. In order to assist some 13,090,000 expellees and refugees to find new homes and jobs and become a part of the West German community, more than $14.3 billion had been spent by January 1961. About 12.5 per cent of the total national product is devoted to social welfare functions (although Erhard makes crystal-clear his opposition to the concept of the paternalistic state). Restitution payments to the victims of the Nazi tyranny have been recognized to the extent of $7.8 billion, half of which has already been paid. The Federal Government has met its defense obligations through expenditures of $19,223 million ($21,823 million if aid to Berlin is included) in the period 1950-1960.[33]

No one knows or can measure the creative potentialities of human beings. The best way to discover who is capable of achievement is to permit all to try, each in accordance with his own inclinations and ideals. In Germany since 1949, talent has burst to the surface where none was ever suspected of existing. The tremendous increase in vertical mobility has already changed attitudes and perhaps values as well in the direction of representational government. With freedom, individuals have experimented with many kinds of social and economic activities. Inevitably, the like-minded have formed voluntary organizations to discuss and, more recently, scrutinize government to see that no one in authority jeopardizes the new-found liberty.

The achievements of the "social market economy" and republican government under federalism should not be exaggerated, however. West Germany is not rich in natural resources, except for coal. No matter how inventive, ingenious, and hard-working Germans may be, relatively full employment and a high level of prosperity depend to an important degree upon an international climate that permits free, fair access to raw materials and markets. The CDU-CSU Government has succeeded in bringing about agreements liberalizing trade in the European area, but a reversal of this trend would have a negative effect. Although about 5.5 million homes were built in the period 1950-1960, construction techniques are less advanced than in the United States. Retail merchandising, especially in food, must be improved if people are to obtain high quality products at low cost.

One reform which Erhard hoped to accomplish early in his administration was the modernization of agriculture and the elimination of subsidies. When the Bonn government assumed power in 1949, the many small farms were divided into about 25 million tiny scattered strips, resulting in "an enormous waste of time, labor and land resources and seriously handicapping mechanization."[34] The "Green Plan," which is the term used to designate the program of government subsidies, distorts the market and delays the fundamental solution to the problem of producing inexpensive fruits, vegetables, meat, and dairy products. The elimination of subsidies, tariff reform, and consolidation (by voluntary means, not by government coercion) of the small plots represent goals which Erhard has not yet been able to realize.

[31] Röpke, *op. cit.*, p. 248.
[32] *Ibid.*
[33] *The Bulletin* (Bonn), Jan. 17, 1961, pp. 1-2.
[34] Office of the U. S. High Commissioner for Germany, *7th Quarterly Report on Germany, April 1-June 30, 1951* (Washington, D. C.: U. S. Government Printing Office, 1951), p. 80.

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ERHARD AND THE FOUNDING Fathers of the Bonn system believed that a private enterprise, market-organized economic order was essential for political liberty and freedom. When the White-Morgenthau policy was abandoned and West Germany was permitted to attempt national regeneration in the political realm, the Germans advanced their views to the military authorities.[35] After much deliberation, the three Military Governors submitted an Aide-Memoire to the Parliamentary Council meeting at Bonn on November 22, 1948, outlining the constitutional principles which the occupation authorities believed should be incorporated into the new "basic law" (*Grundgesetz* rather than *Verfassung* because the Founding Fathers at Bonn wanted to reserve the term "constitution" for the organic statute of a reunited Germany). The Aide-Memoire is a remarkable document, because its recommendations are the result of searching analysis of why the representational system failed in the Weimar Republic, culminating in the Nazi tyranny. As the Aide-Memoire does not seem to be well-known, or, at least, is not often mentioned in scholarly studies of Germany, it is perhaps worthwhile to insert the provisions here:

"They [the Military Governors] believe that the Basic Law should, to the maximum extent possible, provide:

"a. For a bicameral legislative system in which one of the houses must represent the individual states and must have sufficient power to safeguard the interests of the states;

"b. that the executive must only have those powers which are definitely prescribed by the constitution and that emergency powers, if any, of the executive must be so limited as to require prompt legislative or judicial review;

"c. that the powers of the federal government shall be limited to those expressly enumerated in the constitution, and, in any case, shall not include education, culture, health (except, in this last case, to secure such coordination as essential to safeguard the health of the people in the several states); and that its powers in the field of public welfare be limited to those necessary for the coordination of social security measures; and that its powers in the police field be limited to those especially approved by the Military Governors during the occupation period;

"d. that the powers of the federal government in the field of public finance shall be limited to the disposal of monies, including the raising of revenue for purposes for which it is responsible; that the federal government may set rates and legislate on the general principles of assessment with regard to other taxes for which uniformity is essential, the collection and utilization of such taxes being left to the individual states; and that it may appropriate funds only for the purpose for which it is responsible under the constitution;

"e. that the constitution should provide for an independent judiciary to review federal legislation, to review the exercise of federal executive power, and to adjudicate conflicts between federal and *Land* authorities as well as between *Land* authorities, and to protect the civil rights and freedom of the individual;

"f. that the powers of the federal government to establish federal agencies for the execution and administration of its responsibilities should be clearly defined and should be limited to those fields in which it is clear that state implementation is impracticable;

"g. that each citizen have access to public office, with appointment and promotion being based solely on his fitness to discharge the responsibility of the position, and that Civil Service should be non-political in character; and

"h. that a public servant, if elected to the federal legislature, shall resign his office with the agency where he is employed before he accepts election."[36]

[35] For an account of the drafting of the Bonn *Grundgesetz* from the German point of view, see P. H. Merkl, *The Origin of the West German Republic* (New York: Oxford University Press, 1963), p. 269.

[36] Office of Military Government for Germany (U. S.), *Monthly Report of the Military Governor: Report of the Military Governor*, No. 41 (November, 1948), pp. 87-88.

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How unnerving and even galling the provisions of the Aide-Memoire and, indeed, the Bonn Basic Law must be to the modern-day "liberal." Both sources prove that one can "turn the clock back" to the principles of classical liberalism, such as individualism, voluntarism, genuine division of powers, states' rights, and most important of all, limited government.

BUT WHAT ABOUT the Social Democrats? What has been the impact of the return to classical liberalism insofar as their ideological and policy posture is concerned? Are they sincere in rejecting socialism in favor of the "social market economy" now in force?

Although the SPD until very recently opposed every major foreign and domestic policy of the Bonn Government, it is possible to argue that the party has now shifted fundamentally in the direction of strong, if not militant anti-Communism, and that it now supports the private enterprise economic system. It is difficult to conceive how a party could so radically change its position in so short a period of time, but there is evidence that this is what has happened.

The left-right conflict in the SPD over socialism and capitalism was resolved in a draft program published in the SPD paper *Vorwärts* on September 10, 1959. The program eliminated the term "class struggle" and included only one reference to the "privileges of the ruling class." It moved away from socialism and endorsed private enterprise in such phrases as "prosperity for all"; "freedom of choice for consumer goods"; and "free initiative for entrepreneurs." However, other phrases in the program indicated that the Party intended to remain at least partly leftist: "democratic socialism"; "just socialist order"; and "competition as far as possible and planning as far as necessary."

The program called for nationalization of coal and power, control of the management of large industries, cartel regulation, investment supervision, and competition by public enterprises. It preferred respect for religious institutions and endorsed their protection by law and accepted the principle of national defense. The convention of the SPD held at Bad Godesberg approved the major provisions of the draft program on November 16, 1959. Thus, the Bad Godesberg program replaced the Heidelberg program of 1925 and committed the SPD to new policies of private property, a free economy, and national defense. The Bad Godesberg program clearly rejects Marxism and denies that socialism can be made a substitute for religion. The orthodox Marxists at the convention remained almost completely silent, and only 16 out of 340 delegates voted against the program. The public press made clear that the wing of the party which supported the anti-Communist and moderate economic views of Willy Brandt had triumphed over the leftists who had dominated the party in recent years.[37]

IT IS THE ATTITUDES and values which individuals hold and cherish which determine the character of a state, regardless of the forms, structures, laws, or constitutions which may be in force at any given time. It is true that political and governmental institutions contribute to the value pattern of a society, but the family, Church, education, social classes, and the economic system also play important roles. If one seeks a society of free men organized in an independent state, it is logical to assume that the possibilities for success are maximized by creating as complete a climate of freedom as possible. If I interpret the evidence correctly, this has been the position of the leaders of the new German state since the inception of the Federal Republic in 1949 and even before, since the currency reform was in 1948. By honoring the concept of the worth and dignity of the individual Erhard and his supporters have unleashed talent and ability which almost overnight produce a dynamic economic system which in turn made values of vol-

[37] See W. Brandt, *The Ordeal of Co-existence* (Cambridge, Mass.: Harvard University Press, 1963), p. 112, *passim*.

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untarism, fluidity and mobility in the class system meaningful. Since freedom is indivisible, it is only logical to insist on the establishment of a government limited to a range of functions compatible with personal liberty.

Since man is fallible and his institutions necessarily imperfect, one should not overestimate the achievement of the renewed application of principles of classical liberalism in a single country. In West Germany over three-fourths of the adult population had only eight years or less of schooling in 1949. Educational opportunities have increased since that time, of course. However, children are still separated at about age ten into the small group preparing for university or professional education and the large majority who face early terminal education and employment. Good as the system is in many respects, it may deny the country the skills and leadership which a longer and more flexible education might produce. The present system probably reduces mobility, makes the class structure more rigid, and aggravates individual and group conflict. The retention of the old division (almost a caste system) of the *Beamten,* civil service officials with a formal certificate of appointment, and the *Angestellte,* or employees, has a similar effect in the public service.

In the political and governmental field, the partial use of proportional representation permits fragmented, "functionary" parties, although West Germany is practically a two-party country in national elections. Single member constituencies and majority voting may replace proportional representation completely in time, thus compelling party leadership to behave more considerately and responsibly toward party members. Although the right-wing movements have declined in influence since about 1951-1952 and the major parties are committed to the principle of representation, there does not seem to exist any large degree of popular enthusiasm for the mechanical aspects of the Bonn system. Many Germans do not regard it wholly as their own creation. I was told many times: "It's all right, but when we achieve reunification, we will put our heads to the task and come up with something better." Perhaps so, but in the meantime it is possible to conclude that the German experience proves once more that some ideas are better than others, and that sometimes those which have prevailed in the past serve the needs and idealistic aspirations of man better than those which happen to be popular at present.

It has seemed to me that the achievements of Bonn have contributed to the defeat of socialism in the Western European countries. In a trip to the major countries of the Far East in 1963, a research experience which permitted me to talk to heads of state, men in public life, scholars, and businessmen, I found that there was widespread awareness of the German case study. I seemed to detect an awareness of the fact that those countries in the Far East which have taken steps to free their economy (Japan, Taiwan, and the Philippines for example) were regarded as having achieved a more impressive economic and political experience than those which have moved in the direction of state interventionism and planning (such as Indonesia, Ceylon, Burma, or India). As a Latin Americanist, I have many times called attention to the strong penchant for left or right-wing collectivism among both large and small countries in the Western Hemisphere. In the last ten years, however, and especially in the past several years, much evidence has appeared to suggest that people with power and influence in the community are re-examining the principles of classical liberalism, particularly in the economic realm. The case study of Germany in particular, Western Europe in general, and most recently, Spain, which is in the process of dismantling state controls, appears in the literature and in the discourse of knowledgeable people. Even in the United States itself it might be said that some change of direction can be discerned.

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Property Law and Racial Discrimination

ROBERT M. SCHUCHMAN

RECENT CIVIL RIGHTS legislation, both state and federal, has incorporated the premise that the right to use and dispose of private property is limited by the concept that all persons are deserving of an equality of treatment, regardless of race, creed, or nationality. It is not our purpose to review "public accommodations" legislation. Instead, we shall examine the judicially-inspired thesis that the doctrine of racial equality serves as a constitutional limitation on the use and disposition of property, regardless of the presence or absence of statute.

The first pertinent problem considered by the federal courts in this century was the obverse of the principal question here. The issue presented in *Buchanan v. Warley*, 245 U.S. 60 (1917), was whether the government could, through legislation, impose a racial preference on the use and disposition of property. An ordinance of the city of Louisville prevented the residential occupancy of a lot by "a person of color" in a block where the greater number of residences were occupied by white persons. A sale of private property to a Negro in such a block was declared to be void.

The law was defended on the ground that it was a proper exercise of the police power of the state. It was claimed that the ordinance "tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people . . . ." 245 U.S. at 73-74.

A white person sold a residential lot to a Negro in a "white block." When the buyer refused to fulfill the contract, relying upon the racial occupancy ordinance, the seller sued for specific performance, claiming that the Louisville act violated the Fourteenth Amendment to the Constitution.

In its decision, the United States Supreme Court upheld the right to freely dispose of one's property regardless of the local law. The Court said that:

> The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the Constitution.
> 245 U.S. at 79-80.

It further said that:

> The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.
> 245 U.S. at 74.

It must be stressed that *Buchanan v. Warley* does not speak in terms of the equal protection clause of the Fourteenth Amendment. The decision emphasizes

Robert M. Schuchman received his LLB from Yale Law School, where he was an Earhart fellow in economics. He is currently with the law firm of Casey, Lane, and Mittendorf in New York City.

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the "essential attributes" of the rights of property, attributes which, it is said, are protected by the ancient concept of due process of the law.

RACIAL RESTRICTIONS on the alienation of property, when imposed by the government, were struck down in subsequent decisions even when couched in the guise of a zoning regulation. Thus, in *City of Richmond v. Deans,* 37 F.2d 712 (4th Cir.), *aff'd,* 281 U.S. 704 (1930), the court held as violative of the Fourteenth Amendment a zoning ordinance which prohibited the sale of a residence on a block "where the majority of residences on such street are occupied by those with whom said person is forbidden to intermarry . . . ." Because that question was not before the court, it did not rule on the constitutionality of the law prohibiting intermarriage.

The rule that the alienation of property was entirely free from restrictions based on the racial preferences of the state was again upheld in a 1932 case in Missouri. However, the decision in this case left the door open for future regulation if such regulation was found to be for the public welfare.

> Private property cannot, under the guise of police power, be subjected to unreasonable annoyance and arbitrary restriction of its use where public welfare can in no way receive benefit by such restriction.
> *Women's Kansas City St. Andrews Soc. v. Kansas City,* 58 F.2d 593, 598 (8th Cir. 1932).

Now it was no longer a question of the "essential attributes of property." The basic issue was said to be whether "public welfare" could in any way "receive benefit." Since the racial ordinance did not benefit the public welfare, it was stricken.

The constitutional power of the states to attach a racial preference to the exercise of the rights of property seemed a settled issue after *Buchanan v. Warley* and the subsequent line of cases. A governmental body could not, constitutionally, command a property owner to restrict the sale and use of his property to members of a specified race or color.

These early cases dealt with statutes; they were concerned with the limits of the law as exercised through the police power, not with the purely private arrangements of men. If the state could not impose racial preference by law, then the next and obvious question was: Could the state impose racial non-preference on private property and private arrangements by the use of law?

As we have noted, *Buchanan v. Warley* held that a racially restrictive ordinance was void not because it interfered with the federal government's notions of equality, but because it infringed upon the essential rights of property held by the individual. However, when state laws imposing non-discrimination on private arrangements were challenged in the courts, a completely new rationale was used to uphold the laws.

The New York Civil Rights Act provided, *inter alia,* that no labor organization could deny a person membership or equal treatment because of race, color, or creed. In *Railway Mail Ass'n v. Corsi,* 326 U.S. 88 (1945), the union challenged the Act on the ground that, in line with *Buchanan v. Warley,* it was an unconstitutional "interference with its right to selection of membership and abridgment of its property rights and liberty of contract." It was argued that the right of property to be free from one brand of government racial preference implied freedom from any other preference.

The Supreme Court disagreed and held that property was only free from legislation imposing racial discrimination, not from that imposing racial equality:

> A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color.
> 326 U.S. at 93-94.

THUS THE PROTECTION of the right of property by the Fourteenth Amendment, in the racial context, became a simple expression of the racial policy preferences of the state. No longer was

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the right to use property free from the racial preference of law a part of the "essential attributes of property," as far as freedom from positive law restriction was concerned.

The development of the law from a general protection of property rights to a judicially approved mirror of public policy is echoed in the area of purely private arrangements. Contemporaneous with the line of cases concerning laws which express racial preference in property relations is a trend of decisions affecting private agreements and decisions on the use and disposition of property.

The first of these cases concerned the so-called "restrictive covenant" in real property. A racial restrictive covenant is typically an agreement among property owners, binding on the land for a specified number of years, which declares that no property in the area covered by the contract may be sold, leased, or used by members of the Negro race.

Historically, racially restrictive covenants on land were considered to be valid and enforceable contracts. They were agreed upon voluntarily by the contracting landowners, were secured by a valuable consideration, and any new buyer took possession subject to and with notice of the restriction. Except for an isolated case in 1892, such covenants were consistently upheld, except where they violated the common law policy against unreasonable restraints on alienation, or where enforcement was deemed inequitable because of the changed character of the neighborhood. But, after *Buchanan v. Warley*, challenge after challenge was made to these covenants on the ground that they denied the excluded race due process of the laws.

The courts generally rejected this argument without much comment. The *Buchanan* rule was held to apply solely to state action. When purely private parties agreed to a restriction, there was no constitutional violation and no rights were denied by enforcement of the covenant. A clear statement of the early judicial reaction to the racial covenant challenge may be found in the lower court opinion in *Corrigan v. Buckley*, 299 Fed. 899 (D.C. Cir. 1924), which upheld the covenant, stating:

> The constitutional right of a Negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals . . . . Such a covenant is enforceable, not only against a member of the excluded race, but between the parties to the agreement.
> 299 Fed. at 901.

This was a restatement of the "essential attributes of property" argument embodied in *Buchanan v. Warley*. Just as a property owner was free to sell to a Negro despite laws attempting to negate this right, he could agree to refuse to sell to a Negro without state interference. The denial of due process occurred when the state dictated a racial preference in property, not when individual property owners expressed this preference.

On appeal, the Supreme Court affirmed the lower court holding in *Corrigan v. Buckley*, 271 U.S. 323 (1926). The Court emphasized that the due process clause of the Fifth and Fourteenth Amendments was a "limitation only upon the powers of the General Government, and is not directed against the action of individuals." 271 U.S. at 330. Hence, there was no substantial federal question involved in the enforcement of private restrictive covenants. The Court dismissed, without much comment, the novel contention that the Court decree enforcing the covenant was itself state action, and such enforcement therefore denied due process of law to the petitioner.

Such was the state of the law when, in 1948, the landmark case of *Shelley v. Kraemer*, 334 U.S. 1, reached the Supreme Court. On February 16, 1911, thirty out of a total of thirty-nine owners of property in a certain lot in St. Louis, Missouri, signed an agreement, subsequently recorded, which provided in part:

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. . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian Race.

On August 11, 1945, Shelley, a Negro, purchased a parcel of land in the lot concerned. On October 9, 1945, the white landowners in the lot brought suit to enforce the terms of the restrictive covenant. The Supreme Court of Missouri granted the relief, holding the agreement effective and concluding that enforcement of its provisions violated no rights guaranteed by the Federal Constitution. *Kraemer v. Shelley,* 355 Mo. 814, 198 S.W. 2d 679 (1946).

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Shelley took his appeal to the United States Supreme Court. Chief Justice Vinson, in his decision, noted initially that the racial restrictions of this private agreement "could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance," 334 U.S. at 11. But this was a voluntary, private restriction, and a different rule of law applied:

> . . . the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.
>
> We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.
> 334 U.S. at 13.

SO FAR, this is just a restatement of the old law. But Shelley argued, and the Court agreed, that the mere enforcement of these admittedly lawful covenants constituted state action in violation of the Fourteenth Amendment. The reasoning of the Court in this regard is so vital for an understanding of later applications of the "state action" doctrine that I take the liberty of quoting from the decision at some length:

> It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
>
> These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. . . . Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.
> 334 U.S. at 19-20.

The decision in *Shelley v. Kraemer* was shattering in its impact. It held, in effect, that although private racial preference contracts were perfectly valid and legal, their enforcement was unlawful. The Court treated the equitable enforcement of a restrictive covenant as a positive discriminatory act of the state, bringing it within the limitations of the Fourteenth Amendment.

This analysis, it would seem, entirely misconstrues the historical role of courts of equity. Moreover, it ignores the distinction between the judicial function

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of enforcing positive law and that of settling private disputes and construing private agreements. In the *Buchanan v. Warley* situation, the courts were called upon to enforce a legislative enactment expressing racial preference. It was because the underlying act, an expression of the positive law, was contrary to the Fourteenth Amendment, that the enforcement of the law was also barred.

The private agreement in *Shelley v. Kraemer* presents an entirely different situation. There, the underlying act was a voluntary private covenant, admittedly in violation of no law. The role of the court was not one of enforcing a coercively based government measure. Rather, the court was to act as a neutral arbiter of private disputes by carrying out the solemn agreements of a contractual society. In its enforcement of private contracts, the courts should not judge the substance of such contracts. Private agreements, to this observer, need not reflect the prevailing government policies. Otherwise, liberty of contract is a sham.

IT HAD BEEN accepted doctrine in the Anglo-American community that courts were not to write the contracts of men: they were to construe and then enforce them, regardless of which party had the better bargain, so long as the bargain was not illegal. Those who dislike a contract need not agree to it. When a person received notice of a restrictive covenant on a property he wished to buy, he was free to accept it with the covenant or not make the purchase. The novel doctrine of *Shelley v. Kraemer* places the courts in the position of rewriting the bargain to conform to current majority sentiment. To say the least, this is not an expression of freedom of contract.

Numerous cases since *Shelley v. Kraemer* have extended the "state action" thesis even further. In the companion case to *Shelley, Hurd v. Hodge,* 334 U.S. 24 (1948), the Supreme Court considered the enforcement of a restrictive covenant in the District of Columbia. Inasmuch as the Fourteenth Amendment applies only to the states, and not to the District, a different rationale than that relied upon in *Shelley* was required.

One contention of the petitioners in *Hurd v. Hodge* was that "judicial enforcement of the covenants is contrary to . . . treaty obligations of the United States contained in the United Nations charter." 334 U.S. at 28, n.4. To this and other arguments the Court stated that enforcement was

> ...judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of its supervisory powers over the Courts of the District of Columbia. The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.
> 334 U.S. at 35.

Here, as in *Shelley*, we see the notion that property must be used in accordance with the majority sentiment of the day dignified into a governing juridical principle. The final statement of this doctrine, as applied to restrictive covenants in real estate, appeared in the case of *Barrows v. Jackson,* 346 U.S. 249 (1953). A sale of restricted real estate was made to a Negro purchaser and, under the authority of *Shelley v. Kraemer,* he was permitted to occupy the lot without challenge. However, the owners of the adjoining properties, who were parties to the restrictive covenant, sued the white vendor of the lot in question for money damages for breach of contract.

Here it could hardly be argued that "state action" was being used to exclude Negroes and deny rights guaranteed by the Fourteenth Amendment. Unlike *Shelley*, the court was not asked to enforce the contract and expel the Negro purchaser. Rather, the covenanting parties sought to hold the violating party liable for his breach. The Supreme Court disagreed however, and, in a terse decision, disallowed the recovery of dam-

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ages under the authority of *Shelley v. Kraemer.*

The new departure of the Court in *Barrows v. Jackson* was emphasized by Chief Justice Vinson in a vigorously worded dissenting opinion. It will be recalled that Vinson actually wrote the opinion in *Shelley v. Kraemer.* Yet, in *Barrows,* he said:

> The majority seems to recognize, albeit ignores, a proposition which I thought was made plain in the *Shelley* case. That proposition is this: these racial restrictive covenants, whatever we may think of them, are not legal nullities so far as any doctrine of federal law is concerned; it is not unlawful to make them; it is not unlawful to enforce them unless the method by which they are enforced in some way contravenes the Federal Constitution or a federal statute.
>
> * * * * * * *
>
> The majority identifies no non-Caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners, a promise which neither the federal law nor the Constitution proscribes. Indeed, the non-Caucasian occupants of the property involved in this case will continue their occupancy undisturbed regardless of the outcome of the suit.
> 346 U.S. at 261, 262.

As Chief Justice Vinson pointed out, the *Shelley* doctrine goes much further, as applied, than a mere ban on enforcement of private agreements expressing racial preference. Despite all the verbiage about the lawfulness of these agreements in themselves, the Court actually struck down the underlying voluntary agreements. Since *Shelley v. Kraemer,* the Supreme Court has extended the "state action" rule to prohibit more and more p r i v a t e uses of property. In a society where broken agreements can only be enforced through the judicial system, it has declared that, in effect, all contracts partake of state action. As the Supreme Court put it: "Once courts enforce the agreement the Sanction of government is, of course, put behind them [*sic*]." *Railway Employe's Dep't. v. Hanson,* 351 U.S. 225, 232 n.4 (1956). No longer is the Court the neutral enforcer of private contracts; instead, it becomes a participant in the contract.

The *Shelley* rule was extended to labor union contracts in *Brotherhood of R.R. Trainmen v. Howard,* 343 U.S. 768 (1952), where it was held that, under the Railway Labor Act, a union could not make a contract where race was a determinent of employment. One of the reasons therefore was that since Congress authorized the system of collective bargaining through union representatives such representatives would act in violation of the Constitution if they deprived a worker of benefits because of his race. 343 U.S. at 773.

ANOTHER FACET of the *Shelley* doctrine is whether a member of the excluded race has a right to use another person's private property when the exclusion is based solely upon race. The recent trend of decisions concern not judicial enforcement of racial restrictive contracts, but judicial compulsion directed against those voluntarily agreeing to abide by such contracts.

An early case dealing with the question was *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). The contract of sale of a burial lot in the cemetery provided that "burial privileges accrue only to members of the Caucasian race." The Cemetery, acceding to its own contract, refused to bury a certain Winnebago Indian. The decedent's widow sued the Cemetery to compensate her for its action. She argued that judicial recognition of the validity of the racial clause in the burial contract would violate the Fourteenth Amendment and, in addition, the provisions of the United Nations Charter.

The Supreme Court of Iowa denied relief to the widow. It held that, under *Shelley v. Kraemer,* it could not compel the Cemetery to obey its contract by excluding non-Caucasians. However, where the Cemetery was only relying upon the racial clause as a defense to an action, the court could not reform the contract by enforcing it without regard to the racial clause. Moreover, the court said,

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the provisions of the United Nations Charter "have no bearing on the case."

The widow appealed the decision to the United States Supreme Court, which granted certiorari. The Court split down the middle, four Justices for affirmance, four for reversal. Under the traditional rules of the Court, an evenly-divided court is treated as an affirmance of the lower court, but no opinion is filed. Hence, the reasoning of the Justices in this case is unknown, although four jurists apparently believed that the racial restriction in the burial contract could not be privately enforced by the Cemetery. The Iowa Legislature then passed a statute prohibiting denial of burial solely on account of race. This law, governing future burial contracts, made the *Rice* situation a moot question.

But more recent cases have probed more deeply into the issue of a private right to express racial preference on one's own property. In Wilmington, Delaware, a Negro was refused service in a privately owned and operated restaurant which was, however, in quarters leased from the municipal parking agency which owned the building. The Negro sued to compel the restaurant to serve him, on the ground that the restaurant had sufficient proximity to state action for denial of service to constitute a violation of the Fourteenth Amendment. From an adverse decision in the Supreme Court of Delaware, he appealed to the United States Supreme Court.

In, *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the Court reversed the decision, holding that state action was involved in the restaurant, and the Negro could not be denied service because of his race. It was found that the Parking Authority and the city of Wilmington owned the land and the building in which the restaurant was located; the building, a municipal garage, was dedicated to a "public use"; the costs of acquisition, construction, and maintenance of the building were publicly defrayed; and the restaurant gained the benefits of proximity to the parking facility. 365 U.S. at 723, 724. The Court concluded that:

> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.
> 365 U.S. at 724.

The *Burton* case, as can be seen, goes further than *Shelley v. Kraemer.* The issue is no longer limited to judicial enforcement of private contracts. In ***Burton*** the question is whether private uses of property, in terms of racial preference, can be restricted by the courts on the ground that there is "state participation and involvement" in the private property. The overwhelming involvement of the state in all aspects of private property today leads to the conclusion that the *Burton* doctrine can be used to eliminate virtually all expressions of racial preference by private owners on private property, as a matter of constitutional law. Moreover, the doctrine can be used to restrict other voluntary uses of property which do not conform to prevailing majority sentiment.

A FEW EXAMPLES of the broadness of the concept of "state involvement" demonstrates how easily private property can be limited merely by redefining it as government-involved property. *Smith v. Holiday Inns of America, Inc.,* 220 F. Supp. 1 (M.D. Tenn. 1963) was a class action to enjoin the defendant motel from continuing its policy of refusing to accept Negroes as guests. The land for the motel had been acquired by the city of Nashville as part of an urban redevelopment project. The Holiday Inns purchased the land from the city, paying full market value, without tax rebates; the Inns erected the motel with its own funds and at no cost to the public; the operating motel paid all relevant taxes; and, it was found, the state had no interest in the property and no voice in the management, operation and control of the motel.

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This did not satisfy the court, however. Since the deed to the property contained several reservations and covenants placed there by the state and federal governments, to insure future uses of the land in harmony with the redevelopment project, the court held that the state was "involved in private conduct to a significant extent," and the private motel was compelled to drop its policy regarding Negro guests.[1] 220 F. Supp. at 8.

Another recent case, *Simkins v. Moses H. Cone Memorial Hospital,* 323 F.2d 959 (4th Cir. 1963), demonstrates how participation of any sort by a government entity in private property takes that property out of the voluntary sector and places it in the coercive sector of the economy. *Simkins* was an action by Negro physicians, dentists, and patients to compel private hospitals to end racial discrimination. The hospitals, which were entirely private, had accepted federal aid under the Hill-Burton Act (Hospital Survey and Construction Act), 42 U.S.C.A. §291. The court held that acceptance of federal monies placed the hospitals under the rule of the *Burton* case, and Negroes could not be excluded as either doctors or patients:

> Weighing the circumstances we are of the opinion that this case is controlled by Burton . . . . Here the most significant contacts compel the conclusion that the necessary "degree of state [in the broad sense, including federal] participation and involvement" is present as a result of the participation by the defendants in the Hill-Burton program. The massive use of public funds and extensive state-federal sharing in the common plan are all relevant factors, ... But we emphasize that this is not merely a controversy of a sum of money . . . . As the case affects the defendants it raises the question of whether they may escape constitutional responsibilities for the equal treatment of citizens, arising from participation in a joint federal and state program allocating aid to hospital facilities throughout the state. 323 F. 2d at 967.

TO SUMMARIZE these cases, it has been held that "state action" or "state involvement" exists in private property when that property is: (a) leased from the government, and is physically part of a government project; (b) purchased from the government, with the government attaching some covenants restricting use to the deed of sale; and (c) the beneficiary of federal financial assistance. In each situation, the private property owner has been held subject to the same restrictions as a government body.

The most recent Supreme Court extensions of the "state involvement" doctrine have been in the celebrated "sit-in" cases in the South. In each of these cases, civil rights demonstrators entered the "white only" section of segregated lunch counters or restaurants; they demanded service and refused to leave until served. The store manager, following the restaurant's policy, refused to serve them and asked them to leave; when they refused, he called the police, who arrested the demonstrators for criminal trespass. The defendants were convicted, the lower courts finding a clear case of trespass on property wherein the owner did not want their continued presence.

In reversing these cases, the Supreme Court found "state involvement" present in every instance. *Peterson v. Greenville,* 373 U.S. 244 (1963), for example, involved a city where the local ordinance required separation of the races in restaurants

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[1] *Smith v. Holiday Inns of America, Inc.,* has been affirmed by the Court of Appeals for the Sixth Circuit. 336 F.2d 630 (6th Cir. 1964). The Court noted that the Civil Rights Act of 1964 would plainly render the motel's policy of racial exclusion illegal, but, since neither party raised mootness as a defense, they considered the case on its merits.

The motel operator attempted to bring the case outside the rule of the "sit-in" cases by contending, on appeal, that the excluded Negro failed to prove that the motel's actions were "under color of any state law, statute, ordinance, regulation, custom or usage." The Court rejected this argument, stressing that this motel was part and parcel of a large, significant, and continuing public enterprise, *i. e.,* the urban redevelopment project. Thus, state action exists and the exclusion of Negroes in this context violates the Fourteenth Amendment.

Despite this holding, the Court emphasized that "We do not hold that the mere fact that a State agency once held title to a piece of property affects private title forever after with some public quality." It will be interesting to see if the Supreme Court adheres to this admonition.

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(clearly an unconstitutional ordinance). Said the Court:

> It cannot be denied that here the City of Greenville, an agency of the State, has provided by its ordinance that the decision as to whether a restaurant facility is to be operated on a desegregated basis is to be reserved to it. When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice.
> 373 U.S. at 247-48.

But, it was argued, the store manager removed the demonstrators because he wanted to run a segregated restaurant, independent of any ordinance. Thus, it was a private decision, without state involvement. Chief Justice Warren disagreed:

> These convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance. . . . When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.
> 373 U.S. at 248.

After reading *Peterson v. Greenville*, one would think that the touchstone of state involvement was the local segregation ordinance. In other words, absent the ordinance, the store manager could segregate Negroes to his heart's content; it was only because the city government decreed segregation that the private decision to segregate was unlawful. But in the companion case of *Lombard v. Louisiana*, 373 U.S. 267 (1963), also written by the Chief Justice, there was no ordinance or statute compelling racial segregation in restaurants. The store manager called upon the demonstrators to leave his premises without any local command of law to guide his decision.

The Supreme Court found state involvement present anyway. In lieu of an ordinance, the Court found that during the civil rights crisis in the city of New Orleans, the Mayor and the Superintendent of Police had issued statements condemning violence, opposing the "sit-in" movement, and calling for an end to the demonstrations. Although these statements were not made with the force of a law behind them, the Court held that they constituted sufficient "state involvement" to nullify the private decision of the store manager:

> A State, or a city, may act as authoritatively through its executive as through its legislative body. As we interpret the New Orleans city officials' statements, they were determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct . . . . These convictions, commanded as they were by the voice of the State directing segregated service at the restaurant, cannot stand.
> 373 U.S. at 273-74.

The development of the law on private racial preference from *Buchanan v. Warley* to the "sit-in" cases has been most extraordinary. From the position that individuals were free to express a racial preference in the use of their property, regardless of ordinance or statute, we have come to the point where private racial preference is invalid if the Mayor expresses the same preference.

The notion that private property is to be treated as if it were an agency of the government whenever the state is "involved" in that property is a most comprehensive doctrine. In a country where every business must be licensed by the state; every profession must be authorized by the state; every piece of real estate must conform to zoning laws, building codes, fire regulations, housing ordinances, etc.; every labor union must be certified by the state; and almost everybody receives money from the state; in such a regimen one is hard pressed to find any substantial voluntary action which does not have "state involvement" to some degree.

If this be true, then the sphere of private contract and use of property is

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severely restricted. None can deny that discrimination solely on the basis of race is morally indefensible. But the right to discriminate, the right to express a preference in the use of one's property which is at variance with the prevailing majority sentiment is of the very essence of liberty. It is possible that if the state involvement doctrine were alive a century ago, in the days of Dred Scott, the Court would have ruled that a property owner was obligated to treat Negroes as chattels, that manumission was illegal. Today the pendulum is on the other side, in favor of racial equality. But the principle remains: If state involvement means state determination of the uses of property, then private property is a nullity.

For those who may think this analysis far-fetched, and who may disbelieve that this is the trend of judicial decision, I close with the analysis of one of our most advanced jurists, Mr. Justice Douglas. Believing that the majority view in *Lombard v. Louisiana* did not go far enough, Justice Douglas wrote a concurring opinion in which he expressed the view that there was "state action . . . wholly apart from the activity of the Mayor and police." 373 U.S. at 278. This is the basic substance of his commentary:

> Places of public accommodation such as retail stores, restaurants, and the like render a "service which has become of public interest" in the manner of the innkeepers and common carriers of old. . . . In our time the interdependence of people has greatly increased; the days of *laissez faire* have largely disappeared; men are more and more dependent on their neighbors for services as well as for housing and the other necessities of life. By enforcing this criminal mischief statute, invoked in the manner now before us, the Louisiana courts are denying some people access to the mainstream of our highly interdependent life solely because of their race.
>
> When the doors of a business are open to the public, they must be open to all regardless of race if *apartheid* is not to be engrained in our public places. It cannot by reason of the Equal Protection Clause become so engrained with the aid of state courts, state legislatures, or state police.
>
> There is even greater reason to bar a State through its judiciary from throwing its weight on the side of racial discrimination in the present case, because we deal here with a place of public accommodation under license from the State.
>
> State licensing and surveillance of a business serving the public also brings its service into the public domain. This restaurant needs a permit from Louisiana to operate; and during the existence of the license the State has broad powers of visitation and control. This restaurant is thus an instrumentality of the State since the State charges it with duties to the public and supervises its performance. The State's interest in and activity with regard to its restaurants extends far beyond any mere income-producing licensing requirement.
>
> There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of *apartheid,* which is foreign to our Constitution.
>
> 373 U.S. at 279, 281, 282-83.

See also the concurring opinion of Mr. Justice Douglas in *Bell v. Maryland.* 378 U.S. 226, 242 (1964).

THE CONCLUSIONS expressed by Mr. Justice Douglas have been incorporated into the Public Accommodations section of the Civil Rights Act of 1964. However, the statute finds the authority of Congress to interfere with the racial policies of private owners in the plenary power granted the federal government by the Commerce clause of the Constitution.

The view of Justice Douglas goes much further. He enunciates a trend of juridical thinking which holds that all private properly used for business purposes is, as he phrased it, "an instrumentality of the State." If this be true, then private business establishments must indeed conform to the current judicial interpretation of the Constitution, even absent all civil rights laws. The pattern of decision reviewed by this paper demonstrates that in the conflicts between the imposition of normative values by the state and the liberty of private property, it is property which is being sacrificed.

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NEW BOOKS AND ARTICLES

THE FOLLOWING IS A SELECT LIST OF BOOKS AND ARTICLES WHICH, IN THE OPINION OF THE EDITORS, MAY BE OF INTEREST TO OUR READERS.

Armen A. Alchian and William R. Allen, *University Economics.* Belmont, Calif., Wadsworth Publishing Co., 1964. $11.35 (text edition $8.50). An excellent new introductory economics text by two well-known UCLA Professors — both of the "Chicago School" — designed to relegate Samuelson's text to the role of an inferior good.

Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal,* 1949-1962. Cambridge, Mass., The MIT Press, 1964. $5.95. The first major analysis of the federal urban renewal program since its inception. In the opinion of Edward C. Banfield of Harvard University, "There may be some fine points to quibble about, but *The Federal Bulldozer* makes rubble of the urban renewal program."

George J. Stigler, "Public Regulation of the Securities Markets," *The Journal of Business,* April 1964. Prof. Stigler presents fundamental criticisms of the recently published *Special Study of the Securities Markets* on grounds of both methodology and validity of its conclusions, saying "Once we ask for the evidence for its policy proposals, the immense enterprise becomes a promiscuous collection of conventional beliefs and personal prejudices." The article is mainly devoted to setting forth a few statistical models by which the efficiency of the securities market might be judged both before and after the establishment of SEC regulation. In the October 1964 issue of *The Journal of Business* two articles appear in reply, and sharply criticize several points which Stigler makes in the earlier article; but they fail on the whole to refute the thrust of his argument. In his rebuttal, also appearing in the October 1964 issue, Prof. Stigler comments: "The issue is precisely that of the use of 'scientific method' versus 'common sense.' Either we present explicit hypotheses and test them by the developing techniques of the social sciences, or we rely upon the a priori case for protecting investors plus the scandals revealed by a Pecora, or the a priori case for letting men conduct their own affairs plus the counter-scandals revealed by some new counter-Pecora."

Ronald Hamowy, "Liberalism and Neo-Conservatism: Is a Synthesis Possible," *Modern Age,* Fall 1964. A noteworthy attack upon the position that classical liberalism and modern conservatism can be synthesized into a single right-wing philosophy. Hamowy argues that both classical liberalism and modern conservatism arise from distinct and separate traditions of thought, and that their basic premises are fundamentally in conflict.

The fifth volume of the *Journal of Law and Economics* (dated October 1962) has been issued, and includes articles by George J. Stigler, Ronald Coase, Yale Brozen, and others. Of all American scholarly journals, this annual publication is undoubtedly the one most solidly in the classical liberal tradition. A complete set (five issues) may be obtained for $12.50 (students $5.00) by writing: Prof. Aaron Director, *The Journal of Law and Economics,* University of Chicago Law School, Chicago, Illinois 60637.

Philip B. Kurland, "The Supreme Court 1963 Term, Foreword," *Harvard Law Review,* November 1964. A lengthy evaluation of the decisions handed down by the Supreme Court during 1963 which is generally critical of the path the court is taking. Prof. Kurland notes four movements which have gained strength

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during the last decade: "the emerging primacy of equality as a guide to constitutional decision . . . the effective subordination, if not destruction, of the federal system . . . the enhancement of judicial dominion at the expense of the power of other branches of government, national as well as state . . . [and] the absence of workmanlike product, the absence of right quality [in the decisions of the court]." In regard to the first of these movements, he notes the more and more frequent tendency of the court to appeal to the equal protection clause rather than to the due process clause of the Fourteenth Amendment. "There are two primary problems that arise under the equal protection clause. The first is the ambiguity inherent in the relevant term, whether it be 'equality' or 'equal protection of the laws.' The second major difficulty results from the possible conflict of the notion of equality with that of liberty or some other fundamental constitutional value."

Regenery has published two new books on or by Albert Jay Nock: his autobiography, *Memoirs of a Superfluous Man* (Chicago, 1964. $5.95), is reprinted from the 1943 edition which is no longer available; and Robert J. Crunden, *The Mind and Art of Albert Jay Nock.* Chicago, 1964. $4.95. The latter is an excellent intellectual biography, and contains an appendix listing his uncollected articles.

Richard M. Weaver, *Visions of Order: The Cultural Crisis of Our Time.* Baton Rouge, La., Louisiana State University Press, 1964. $4.50. A posthumous collection of Prof. Weaver's essays concerned with an elaboration of the uses of order and tradition in society, and a critique of modern-liberalism and sentimental democracy.

Hanson W. Baldwin, "Should We End the Draft?," *New York Times Magazine,* Sept. 27, 1964. The military expert of the *New York Times* summarizes the major arguments for and against ending conscription, while lending the weight of his authority to the opinion that "there is not much doubt that long-term professional services — active and reserve — are better suited to the military requirements of the atomic age than large, semi-trained, rapid-turnover forces drafted or induced to serve by the prospect of the draft."

Prof. Ernest van den Haag of the New School discusses the question of Negro intelligence in an interesting interview published in *National Review* ("Intelligence or Prejudice?," December 1, 1964). His conclusions are essentially: (1) There is no scientific evidence supporting the currently popular theory that no innate intelligence differences exist between ethnic groups; (2) There is some, although not conclusive, evidence that the contrary is true; and (3) that even if (2) were proven to be the case, genetically determined intellectual inferiority of the members of a particular race in no way implies their moral inferiority. See also the criticisms and reply in the Feb. 9, 1965, issue of *National Review.* On the same theme there is an excellent review of Weyl and Possony's *Geography of Intellect* in the *University of Chicago Law Review,* Spring 1964, by Warren Lehman. Rather than dealing with the shoddy and unscientific approach of the authors, Lehman concentrates on the possible legal implications of their conclusion that interracial intelligence comparisons indicate sharp distinctions exist. Lehman attacks the thesis — interestingly enough shared by many violent anti-racists — that scientific evidence on the intellectual inferiority, superiority, or equality of one race over another is relevant to their legal (and particularly constitutional) status.

The latest (we think) issue of *Focus Midwest* (Vol. III, Number 6) is devoted to a "roster of the right wing" which runs the gamut from the American Farm Bureau to the Soldiers of the Cross and the American Nazi Party. If one is inured to the incredibly unsophisticated approach manifested by the leftist counterparts of The Christian Crusade, he will find much information of interest and value in this publication.

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